*11 So. 3d 1031, *; 2009 La. LEXIS 1472, ***

STATE OF LOUISIANA VERSUS JASON MANUEL REEVES

NO. 2006-KA-2419

SUPREME COURT OF LOUISIANA

2006-2419 (La. 05/05/09); 11 So. 3d 1031; 2009 La. LEXIS 1472

May 5, 2009, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Reeves v. Louisiana, 2009 U.S. LEXIS 8304 (U.S., Nov. 16, 2009)

PRIOR HISTORY: [1]**
ON APPEAL FROM THE FOURTEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF CALCASIEU. HONORABLE G. MICHAEL CANADAY, JUDGE.
State v. Reeves, 890 So. 2d 590, 2004 La. App. LEXIS 2683 (La.App. 3 Cir., Nov. 10, 2004)

DISPOSITION: AFFIRMED.

CASE SUMMARY:
PROCEDURAL POSTURE: Defendant sought review of the decision of the Fourteenth Judicial District Court for the Parish of Calcasieu (Louisiana), which convicted him of first-degree murder in violation of La. Rev. Stat. Ann. § 14:30 and sentenced him to death.

OVERVIEW: Defendant was convicted of the first-degree murder of a four-year-old girl and received a death sentence. His first trial ended in a mistrial. The supreme court affirmed, stating that defendant was not constitutionally entitled to the counsel of his choice under U.S. Const. amend. VI and La. Const. art. I, § 13. Moreover, the district court anticipated that the appointment of qualified local counsel would facilitate prompt resolution of future funding and other questions that would arise in connection with defendant's retrial. There was seemingly insoluble funding issues that plagued the judicial district at that time and appointing local counsel allowed the district court to quickly set hearings for questions that arose pretrial. The supreme court also found that there was nothing constitutionally that supported the defense's argument that a criminal defendant had a right to a particular attorney-client relationship in the absence of a right to counsel of choice. Defendant's death sentence was appropriate under La. Const. art. 1, § 20. The victim was under the age of 12 years, thus establishing an aggravating circumstance.

OUTCOME: The judgment was affirmed.

CORE TERMS: indigent, public defender, funding, retrial, sentence, appointed, murder, conflict of interest, appointed counsel, seal, caseload, degree murder, defense counsel's, assistance of counsel, box, appointment, counsel of choice, parte,

attorney-client, reimbursement, aggravated, judicial district, pretrial, rape, cemetery, supplemental, perpetration, labeled, penalty phase, district board

LEXISNEXIS(R) HEADNOTES

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment
Criminal Law & Procedure > Appeals > Appellate Jurisdiction > General Overview

HN1 See La. Const. art. 5, § 5(D).

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Children > General Overview
Criminal Law & Procedure > Trials > General Overview

HN2 Public disclosure of the name of a juvenile crime victim, when the crime results in the death of the victim, is not prohibited by La. Rev. Stat. Ann. § 46:1844(W), which seeks to ensure the confidentiality of crime victims who are minors and victims of sex offenses.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial

HN3 A defendant may raise certain ineffective assistance of counsel claims, prior to trial, when judicial economy demands it. Additionally, a trial judge must make findings individually tailored to each defendant with regard to the representation he received or was receiving.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN4 Uncompensated representation of indigents, when reasonably imposed, is a professional obligation burdening the privilege of practicing law in Louisiana, and does not violate the constitutional rights of attorneys. However, in order for the appointment to be reasonable, and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs. District judges were charged with the authority to determine, in their discretion, what would constitute an unreasonable level of time that an attorney must devote to a particular case without compensation of a fee. Such a system will strike a balance between the attorney's ethical duty to provide services pro bono publico and his or her practical need to continue to perform his or her other obligations. If the district judge determines that funds are not available to reimburse appointed counsel, he should not appoint members of the private bar to represent indigents. Budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys' professional responsibilities.

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Criminal Law & Procedure > Witnesses > Presentation
Criminal Law & Procedure > Defenses > Right to Present
Evidence > Testimony > Experts > General Overview

HN5 In addition to the right to counsel, an indigent defendant must also have a fair

opportunity to present his defense. This often requires the assistance of expert witnesses. When a defendant is indigent, he must obtain funding to pay for this expert assistance. However, in requesting certain types of expert assistance, the defense may be divulging important trial strategies.

Criminal Law & Procedure > Witnesses > Presentation
Evidence > Testimony > Experts > General Overview

HN6 An indigent defendant may file a motion for expert funding ex parte. Notice of the filing of the motion should be given to the State, which may file an opposition to the hearing being held ex parte and/or to the request for funding. The trial court should first determine, in camera, either on the face of the allegations of the motion or upon taking evidence at an ex parte hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue ex parte. If not, then the hearing should be held contradictorily with the District Attorney.

Criminal Law & Procedure > Witnesses > Presentation
Evidence > Testimony > Experts > General Overview

HN7 At the hearing on expert funding, whether ex parte or contradictory, the defendant must first show a need for the funding. The defendant must show with a reasonable degree of specificity what type of expert is needed and for what purpose. The indigent defendant requesting governmental funding for the securing of expert assistance must show that it is more likely than not that the expert assistance will be required to answer a serious issue or question raised by the prosecution's or defense's theory of the case. If the defendant meets this burden, then the court is to order that the funds be provided by the state. If the defendant fails to meet this burden, and the proceedings were held ex parte, both the written reasons for denial and the record of the proceedings are to remain under seal during the pendency of the defendant's prosecution, including appellate review.

Criminal Law & Procedure > Witnesses > Presentation
Evidence > Testimony > Experts > General Overview

HN8 A district court must use its discretion in its decisions regarding the funding of expert assistance for indigent defendants. While noting that the State's substantial interest in protecting the public fisc demands that some form of opposition by the state be allowed, case law has declared the district court to be an adequate guardian of the State's financial interests from frivolous requests for the funding of expert assistance.

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN9 See La. Rev. Stat. Ann. § 15:304.

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN10 The State, and not the parish, was responsible for indigent funding.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN11 "Budget exigencies" could not serve as an excuse for the oppressive or abusive extension of attorneys' professional responsibilities. Moreover, in order to ensure that indigent defendants are provided with their constitutional and statutory rights to counsel and to expert assistance, the Supreme Court of Louisiana has, in the past, exercised its constitutional and inherent power and supervisory jurisdiction to impose corrective measures.

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN12 Counsel must be appointed for an indigent defendant from the time of the indigent defendant's first appearance in court, even if the judge cannot then determine that funds sufficient to cover the anticipated expenses and overhead are likely to be available to reimburse counsel. Counsel appointed before a funding source was identified could subsequently file a motion to determine funding. Thereafter, if the district court determined that adequate funding was not available, the Supreme Court of Louisiana authorized the defendant to file a motion to halt the prosecution until adequate funding became available. District judgment were authorized, in their discretion, to prohibit the State from proceeding with a prosecution until he or she would be able to determine that appropriate funding was likely to be available thereafter.

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN13 In the Louisiana Public Defender Act of 2007, 2007 La. Acts 307, it was explicitly recognized case law authorized trial judges to halt prosecutions in capital cases, upon motion of defense counsel, until adequate funding is provided to ensure an adequate defense, and it is the express intention of the legislature to ensure adequate resources, which allow prosecutions in such cases to continue to conclusion resulting in verdicts that are fair, correct, swift, and final, La. Rev. Stat. Ann. § 15:142(D).

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

HN14 See U.S. Const. amend. VI.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > Trials

HN15 There is an efficacy of having the assistance of counsel during the adversarial procedure of a criminal trial. U.S. Const. amend. VI secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime. The assistance of counsel may be secured in various ways: the hiring of an attorney's services by the criminal defendant or by another on behalf of the defendant, the attorney's volunteering of services pro bono publico, or the court's appointment of private counsel or the public defender if the defendant is indigent.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN16 Although the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant, U.S. Const. amend. VI also encompasses the right to select and be represented by one's preferred attorney. A criminal defendant represented by an otherwise qualified attorney paid for by the defendant or paid for by someone on behalf of the defendant, or who has accepted the donation of an attorney's services, has the right to counsel of his choice. U.S. Const. amend. VI guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds. However, U.S. Const. amend. VI's right to choose one's own counsel is circumscribed in several important respects. A criminal defendant who has been appointed counsel has no right under U.S. Const. amend. VI to the counsel of his choice.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN17 U.S. Const. amend. VI guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. A defendant may not insist on representation by an attorney he cannot afford. The right to counsel of choice does not extend to defendants who require counsel to be appointed for them.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

HN18 The United States Supreme Court has found structural error requiring reversal, and a violation of U.S. Const. amend. VI, where a criminal defendant has been denied his right to retained counsel of choice, or where a criminal defendant has been denied the representation of counsel of choice willing to donate his services. Where the right to be assisted by counsel of one's choice is wrongly denied, no harmless-error analysis which inquires into counsel's effectiveness, or prejudice to the defendant, is required. Deprivation of the right is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice, which is the right to a particular lawyer regardless of comparative effectiveness, with the right to effective counsel, which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN19 Under the Federal Constitution, a criminal defendant who has hired his own

counsel, or who has counsel retained on his behalf, has a right to both effective representation and to counsel of his choice. The same is true of a criminal defendant whose counsel has volunteered his services. A criminal defendant who has been appointed counsel, whether a private attorney or a public defender, only has the right under the federal constitution to effective representation.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN20 See La. Const. art. I, § 13.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN21 As a general proposition a person accused in a criminal trial has the right to counsel of his choice. If a defendant is indigent he has the right to court appointed counsel. An indigent defendant does not have the right to have a particular attorney appointed to represent him. An indigent's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice, if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN22 The right to counsel of choice extends to a criminal defendant who has hired his own counsel. In addition, the right to counsel of choice extends to a defendant who has had an attorney hired for him by a collateral source. Both the federal and state constitutions precluded the removal of counsel obtained through a collateral source. The right to counsel of choice also extends under the State constitution to a criminal defendant for whom an attorney volunteers his legal services. The right to private, non-appointed counsel of choice does not distinguish between a paid attorney and a pro bono lawyer.

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN23 Former La. Rev. Stat. Ann. § 15:144 established an indigent defender board in each judicial district. In order to provide counsel for indigent defendants in its judicial district, the Calcasieu Parish Indigent Defender Board selected the model of employing a chief indigent defender and such assistants and supporting personnel as the district board deemed necessary, former La. Rev. Stat. Ann. § 15:145(B)(2)(a). Additionally, the legislature authorized the district boards to enter into contracts with other attorneys to provide counsel for indigent defendants when necessary, § 15:145(B)(3). Each district indigent defender board was authorized to accept, receive and use

public or private grants, former § 15:145(F). The primary source of funding for the district boards, however, was the indigent defender fund created within each judicial district, which the district boards administered, and which was additionally composed of funds obtained through legislatively-authorized fees and direct state contributions, former La. Rev. Stat. Ann. § 15:146.

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN24 See former La. Rev. Stat. Ann. § 15:144(A).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN25 See former La. Rev. Stat. Ann. § 15:145(B)(2)(a).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN26 See former La. Rev. Stat. Ann. § 15:145(B)(3).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN27 See former La. Rev. Stat. Ann. § 15:145(F).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN28 See former La. Rev. Stat. Ann. § 15:146.

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN29 The Louisiana Indigent Defense Assistance Board (LIDAB) provided supplemental funds, when appropriated by the legislature, to district indigent defender boards to address specific criminal defense needs, former La. Rev. Stat. Ann. § 15:151.2(A). One of the specific criminal defense needs to be addressed by the LIDAB was the adoption of rules for supplemental assistance for trial counsel in capital cases where the local indigent defender board was unable to provide counsel, § 15:151.2(D). The LIDAB was authorized by the legislature to develop and maintain programs to implement the guidelines for this type of supplemental assistance, § 151.2(E)(1).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN30 See former La. Rev. Stat. Ann. § 15:151(A).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN31 See former La. Rev. Stat. Ann. § 15:151.2(A).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN32 See former La. Rev. Stat. Ann. § 15:151.2(D).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN33 See former La. Rev. Stat. Ann. § 151.2(E)(1).

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN34 Pursuant to former La. Rev. Stat. Ann. § 15:145(B)(3) the district board had the authority to enter into contracts with other attorneys in order to handle specific cases.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Counsel

HN35 The removal of counsel must be reviewed for an abuse of the trial court's great discretion.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN36 The United States Supreme Court has rejected any claim that U.S. Const. amend. VI guarantees a meaningful attorney-client relationship between an accused and his counsel.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN37 A conclusion that the U.S. Const. amend. VI right to counsel would be without substance if it did not include the right to a meaningful attorney-client relationship, is without basis in the law.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN38 The Supreme Court of Louisiana has found nothing in its State constitution, or in its review of State jurisprudence, which shows that a criminal defendant has a right to a particular attorney-client relationship separate from the right to counsel of choice.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Costs & Attorney Fees
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial
Evidence > Testimony > Experts > General Overview

HN39 A defendant provided private counsel, through a collateral source, has a constitutional right to counsel of choice. Retention of private counsel from a collateral source, at no cost to the defendant, does not remove the defendant's right to a fair trial. Thus, notwithstanding the fact that the criminal defendant has no need for appointed counsel, the defendant may still be entitled to State funding for auxiliary services, such as experts.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Speedy Trial
Criminal Law & Procedure > Grand Juries > Indictments > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN40 A capital case is instituted by indictment by a grand jury, La. Code Crim. Proc. Ann. art. 382(A). La. Code Crim. Proc. Ann. art. 578 provides that no trial shall be commenced in a capital case after three years from the date of institution of prosecution. In addition, both the State and a defendant have the right to a speedy trial, La. Const. art. 1, § 16; La. Code Crim. Proc. Ann. art. 701.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
Criminal Law & Procedure > Postconviction Proceedings > General Overview
Criminal Law & Procedure > Appeals > Procedures > Briefs

HN41 A claim of ineffectiveness is generally relegated to postconviction proceedings, unless the record permits definitive resolution on appeal. While it is generally true that ineffectiveness claims are considered on postconviction, a claim of ineffectiveness may be raised pretrial, based on counsel's ability to provide constitutionally effective counsel due to resources available and caseload concerns.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview

HN42 In evaluating a defendant's ineffective assistance claim, the district court is required to undertake a detailed examination of the specific facts and circumstances of the case. This detailed examination is necessary because there is no precise definition of reasonably effective assistance of counsel, which cannot be defined in a vacuum. Thus, of necessity, each ineffective assistance claim demands an individual, fact-specific inquiry. The true inquiry for the district court is whether an individual defendant has been provided with reasonably effective assistance, and no general finding by the trial court regarding a given lawyer's handling of other cases, or workload generally, can answer that very specific question as to an individual

defendant and the defense being furnished him. In reviewing a district court's decision on a claim of ineffective assistance, courts take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.

Criminal Law & Procedure > Pretrial Motions & Procedures > Continuances
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances

HN43 The decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb such a determination absent a clear abuse of discretion, La. Code Crim. Proc. Ann. art. 712. The Supreme Court of Louisiana also generally declines to reverse convictions even on a showing of an improper denial of a motion for a continuance absent a showing of specific prejudice.

Criminal Law & Procedure > Pretrial Motions & Procedures > Continuances

HN44 See La. Code Crim. Proc. Ann. art. 712.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Legal Ethics > Client Relations > Conflicts of Interest

HN45 As a general rule, Louisiana courts have held that an attorney laboring under an actual conflict of interest cannot render effective legal assistance to the defendant whom he is representing. An actual conflict of interest has been defined, as follows: If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to the other client. The issue of conflicting loyalties may arise in several different contexts, but may include the circumstance where an attorney runs into a conflict because he or she is required to cross-examine a witness who is testifying against the defendant and who was or is a client of the attorney.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview
Legal Ethics > Client Relations > Conflicts of Interest

HN46 If the issue of counsel's alleged conflict of interest is raised in a pretrial setting, the district court has two options: appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interest is too remote to warrant separate counsel. Failure to do one or the other in a case in which an actual conflict exists requires reversal. If the issue of counsel's alleged conflict of interest is not raised until after trial, the defendant must prove that an actual conflict of interest adversely affected his lawyer's performance. Because the prejudice to the defendant may be subtle, even

unconscious, where the conflict is real, a denial of effective representation exists without a showing of specific prejudice. The first step in the analysis of an alleged conflict of interest raised either pretrial or posttrial is whether an actual conflict of interest existed.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview
Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN47 La. Const. art. 1, § 20 prohibits cruel, excessive, or unusual punishment. La. Code Crim. Proc. Ann. art. 905.9 provides that the Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview
Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN48 See La. Sup. Ct. R. 28, § 1.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN49 Pursuant to La. Code Crim. Proc. Ann. art. 905.3, a jury need find only one aggravating circumstance in order to consider imposing a sentence of death.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances
Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances
Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

HN50 See La. Code Crim. Proc. Ann. art. 905.3.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements

HN51 See La. Rev. Stat. Ann. § 14:41(A).

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements

HN52 See La. Rev. Stat. Ann. § 14:42.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN53 The Supreme Court of Louisiana has given the statutory aggravating circumstance of heinousness a narrow construction, requiring that to be valid there must exist elements of torture, pitiless infliction of unnecessary pain or serious bodily abuse prior to death. Torture requires evidence of serious physical abuse of the victim before death. Also, the murder must be one in which the death was particularly painful and one carried out in an

inhumane manner. A victim's awareness of impending doom is relevant to a finding of heinousness.

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment
Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN54 Federal constitutional law does not require a proportionality review. Nonetheless, La. Sup. Ct. R. 28 § 4(b) provides that the district attorney shall file with the Supreme Court of Louisiana a list of each first-degree murder case in the district in which the sentence was imposed after January 1, 1976. The Supreme Court of Louisiana reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Penalties
Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment
Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN55 The Supreme Court of Louisiana has held that it may look beyond the judicial district in which the sentence was imposed and conduct the proportionality review on a statewide basis. A statewide review of cases reflects that jurors find the death penalty appropriate in cases in which the victim is a young child and where the murder is committed during the perpetration or attempted perpetration of an aggravated rape.

COUNSEL: CAPITAL APPEALS PROJECT, Jelpi Pierre Picou, Jr., G. Benjamin Cohen; For Appellant.

James D. Caldwell, Attorney General, John F. DeRosier, District Attorney, Frederick Wayne Frey, Carla Sue Sigler, Cynthia Skerrett Killingsworth, Assistant District Attorneys; For Appellee.

JUDGES: TRAYLOR, Justice. CALOGERO, C.J., retired, recused. Chief Justice Calogero recused himself after oral argument and he has not participated in the deliberation of this case.

OPINION BY: TRAYLOR

OPINION

[*1035] [Pg 1] **TRAYLOR, Justice** *

FOOTNOTES

* CALOGERO, C.J., retired, recused. Chief Justice Calogero recused himself after oral argument and he has not participated in the deliberation of this case.

On December 13, 2001, a Calcasieu Parish grand jury indicted the defendant, Jason Reeves, for the first degree murder of a four year old girl, identified as M.J.T., which occurred on November 12, 2001, in violation of La. R.S. 14:30. Reeves' first trial began with jury selection on October 27, 2003, and ended in a mistrial on November 9, 2003.

Reeves' retrial commenced with jury selection on October 12, 2004. On November 5, 2004, the jury **[**2]** returned a unanimous verdict of guilty as charged. After a penalty phase hearing, the same jury unanimously recommended a sentence of death after finding as aggravating circumstances: (1) the defendant was engaged in the perpetration or attempted perpetration of aggravated rape; (2) the victim was under the age of twelve years; and (3) the offense was committed in an especially heinous, atrocious or cruel manner. On December 10, 2004, after denying post-verdict **[*1036]** motions, the trial court imposed the sentence of death in accordance with the jury's verdict.

The defendant now brings the direct appeal of his conviction and sentence to [Pg 2] this court pursuant to La. Const. art. 5, § 5(D). [1] After a thorough review of the law and the evidence, we find that none of the arguments put forth by the defendant constitute reversible error, and affirm the defendant's conviction and sentence.

FOOTNOTES

1 La. Const. art. 5, § 5(D) provides in pertinent part:

HN1(D) Appellate Jurisdiction. In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if ... (2) the defendant has been convicted of a capital offense and a penalty of death actually has been imposed.

FACTS

2

FOOTNOTES

2 The **[**3]** record of this case consists of 44 volumes (hereinafter Vol. 1-44), a 4-volume supplement (hereinafter 1st Supp. Vol. 1-4), a 1-volume supplement (hereinafter 2nd Supp.), exhibits (hereinafter identified as Ex. # x), and a box labeled "All Documents Under Seal" which contains numerous documents filed under seal and transcripts of *ex parte* hearings. Reference in this opinion will be made to the volume number, if any; the page number within the numbered

volumes and supplements; the exhibit and its identifying number; and/or any other identifying information for the documents filed under seal or *ex parte*.

No challenge is raised to the sufficiency of the evidence used to convict the defendant of first degree murder. After our review of the record, we find the following facts to be proved beyond a reasonable doubt.

On November 12, 2001, at approximately 3:15 p.m., the Calcasieu Parish Sheriff's Office (CPSO) received a complaint of a suspicious vehicle at a school in Moss Bluff, Louisiana. The vehicle was described as a blue four-door, older model vehicle which may have been an Oldsmobile Cutlass. The driver of the vehicle, who was described as wearing a maroon t-shirt and blue jeans, was **[**4]** loitering in the parking lot of the school and conversing with two young female students. The complaint included the license plate number of the suspicious vehicle. A check on the license plate revealed that the defendant, Jason Manuel Reeves, was the owner of a blue Oldsmobile Cutlass, with the same license plate number, and that he had a criminal history of sexual offenses with minors.

Shortly thereafter, at 5:02 p.m., the CPSO received a 911 call from the mother of a four-year old girl, M.J.T., who had disappeared from McFatter Trailer Park in [Pg 3] Moss Bluff. [3] The trailer park is located 3 miles from the school where the suspicious vehicle had been reported. The young girl's mother, C.T., told sheriff's deputies that she had seen a suspicious, older model, blue vehicle circling the trailer park prior to the time she realized her daughter was missing. She also remembered a red sticker in the vehicle's rear window. C.T. later identified Reeves' vehicle as the one she saw in the trailer park on November 12, 2001.

FOOTNOTES

[3] HN2 Public disclosure of the name of a juvenile crime victim, when the crime results in the death of the victim, is not prohibited by La. R.S. 46:1844(W) (which seeks to ensure **[**5]** the confidentiality of crime victims who are minors and victims of sex offenses). Nevertheless, throughout this opinion the victim and her family will be identified only by their initials.

That evening, CPSO deputies went to Reeves' home and obtained permission from him, and his mother with whom he lived, to search his vehicle and home. After finding no evidence connecting Reeves to the missing girl, the deputies informed Reeves of his constitutional rights and **[*1037]** asked him to go to the sheriff's office for further questioning. Reeves agreed and followed the deputies in his own car to the CPSO because he did not know where the sheriff's office was located.

Reeves arrived at the CPSO at approximately 10:20 p.m., was informed of his constitutional rights, and signed a form waiving them. He was initially questioned from 10:45 p.m. until 12:40 a.m. [4] Thereafter, Reeves was taken to an interview room in the detectives' area, which is a secure area. [5] Reeves was again informed of

his constitutional rights and was questioned throughout the night with regard to his whereabouts and activities on November 12, 2001.

FOOTNOTES

4 This initial questioning from 10:45 p.m. until 12:40 a.m. was, in fact, a polygraph [**6] examination to which Reeves agreed to submit. After taking the test, Reeves overheard or was told that he had failed. Although one of the detectives testifying at trial made a brief comment, unresponsive to questioning, about the fact that Reeves took a polygraph examination, the jury was not informed of the lie detector test's results, nor was the fact that Reeves underwent a polygraph examination otherwise disclosed. The brief mention of the fact that Reeves submitted to a polygraph examination is discussed in Assignment of Error 12 in the unpublished appendix.

5 A key code was necessary to enter the area but not to exit.

Reeves told the officers that he had finished work at approximately 3 p.m., [Pg 4] purchased a drink at a gas station, and driven home, arriving at approximately 4 p.m. Judy Doucet, the defendant's mother, told sheriff's deputies that she specifically remembered her son arriving home around 5:00 p.m. or 5:30 p.m. Throughout questioning, Reeves continually denied any involvement with the missing girl. These statements were not recorded.

From the time M.J.T. was reported missing until sometime on November 13, 2001, individuals assisting in the search for M.J.T. recovered [**7] evidence from a creek located approximately 15 minutes from McFatter Trailer Park, near a wooden bridge on Charles Breaux Road. The victim's mother identified a pair of a child's white tennis shoes and a pair of girl's purple pants as having been worn by M.J.T. at the time of her disappearance.

On November 13, 2001, at 9:16 a.m., deputies obtained Reeves' permission to obtain his bodily substances for testing, then transported him to a local hospital where the requested samples were obtained. A nurse collected blood samples, oral swabs, pubic hair combings and fingernail scrapings from Reeves. A physical examination of Reeves at this time showed scratches on the inside of his left upper thigh, on his nose, and on his arms. He also had abrasions on both knees.

Around 11:40 a.m. on November 13, 2001, Reeves was placed under arrest on an outstanding warrant from another parish. At that time, Reeves was again informed of his constitutional rights, interrogated further, and then placed in the jail. During this interview, a detective made the statement that only two people knew what really happened to M.J.T. Reeves replied, "Yeah, me and the good Lord." 6 Despite making this statement, Reeves [**8] continued to deny involvement with the disappearance of M.J.T.

FOOTNOTES

[6] Vol. 39, p. 9549.

[Pg 5] On November 14, 2001, at approximately 11 a.m., deputies took Reeves from his jail cell to the detectives' interview area where he was again *Mirandized*. Reeves continued to deny involvement with the missing girl but further details which had emerged in questioning were now preserved on videotape. While still maintaining he finished work around 2:30 **[*1038]** p.m. or 3:00 p.m., he related that he had driven in the direction of the Chardele Trailer Park to visit his cousin, but turned around when he realized he did not know his cousin's trailer number. Reeves then headed back in the direction of Moss Bluff, stopping at a convenience store to purchase a Mountain Dew soft drink. He claimed he traveled along a highway toward his grandfather's house, but remembered *en route* that his grandfather would not be home. Reeves then claimed he turned around in the parking lot of a Moss Bluff school, speaking briefly to a woman there. He continued traveling and stopped along the way at McFatter Trailer Park to see an old friend, Kurt Leger, with whom he had worked offshore. He asked a group of children at the trailer park **[**9]** if they knew where his friend Kurt lived. Reeves then claimed his car overheated, so he waited for the vehicle to cool down before driving home, where he claimed to have arrived by 4:00 p.m. This statement concluded when lunch was brought to Reeves at 12:40 p.m.

At approximately 2:30 p.m. on November 14, 2001, the body of M.J.T. was found in a secluded area in some woods, 10-15 yards off a trail next to LeBleu Cemetery. The cemetery is located approximately 8.2 miles from McFatter Trailer Park. [7] A Mountain Dew soft drink bottle was recovered approximately 25 feet away from where the body was found. The little girl's body, clothed only in a purple shirt [Pg 6] pulled up halfway and naked from the waist down, had been stabbed multiple times. M.J.T. was found lying on her back with her legs bent, with signs of sexual abuse evident. Before evidence was gathered or the body was touched, law enforcement officers videotaped the crime scene.

FOOTNOTES

[7] At trial, the state presented evidence in the form of a map which showed the close proximity of the various locations involved in the case. The McFatter Trailer Park is 3 miles from the Moss Bluff school, where the defendant was seen prior to M.J.T.'s **[**10]** disappearance. LeBleu Cemetery is 3.8 miles from the bridge on Charles Breaux Road. The bridge is 18.3 miles from the defendant's house. The defendant's house is 8.2 miles from the cemetery. From the defendant's house to the trailer park to the cemetery is 8.2 miles.

Interrogation of Reeves began again around 8 p.m. Former FBI Agent Don Dixon

confronted Reeves with photographs of M.J.T.'s body taken at the murder scene. As a pre-arranged strategy, Agent Dixon told Reeves that a latent print found on a palmetto leaf tied him to the murder scene. [8] At 9:25 p.m., detectives began videotaping the interview, during which Reeves confessed to having the girl in his car and taking her to the cemetery. He walked with her into the nearby woods, where they sat down and watched a rabbit. Reeves whittled a piece of wood with his pocket knife. Reeves then claimed he blacked out and does not remember doing anything else to the little girl. The next thing Reeves remembers was walking toward his car parked in the cemetery's parking lot, stopping at his sister's grave, saying good-bye and that he was sorry. When he reached his car, he noticed his pants were unzipped and his knife was missing.

FOOTNOTES

[8] A latent **[**11]** handprint was found on a palmetto leaf along the trail in the woods near the cemetery, approximately 30 yards from where the body was discovered. A fingerprint examiner later examined the print and testified that the print did not have sufficient detail to make an identification. However, the expert was able to eliminate the defendant as the source of the print.

Reeves had requested to speak with his mother. At 10:40 p.m., the videotape was stopped when Reeves' mother arrived at the sheriff's office. One of the detectives **[*1039]** monitored Reeves' conversation with his mother and heard Reeves say, "I did this thing. I don't know why, but I did it." [9]

FOOTNOTES

[9] Vol. 39, p. 9728.

Thereafter, Reeves indicated that he wanted to finish the interview because his actions had hurt his mother and the victim's family. Reeves was *Mirandized* again [Pg 7] and continued his statement at 11:12 p.m. He expanded his earlier statements and acknowledged that he picked up M.J.T. to "go fool with her." He took her to the cemetery since the cemetery was a secluded place. After visiting his sister's grave and becoming very angry, Reeves took M.J.T. to the woods and started touching her on her bottom. Reeves admitted he told **[**12]** M.J.T. throughout the encounter that he would bring her back home and other things in an attempt to calm her down. M.J.T. became upset and asked him to stop, which further angered Reeves, who was still wielding his knife. Although he claimed he did not remember taking off M.J.T.'s pants or assaulting her, Reeves acknowledged that he was the only person who could have stabbed her. Reeves hurried out of the cemetery, fearing that M.J.T. was not alive when he left her. He does not remember anything about disposing of her pants and shoes. He does remember driving home with dirt and possibly a light smear of blood on his arms. He rinsed off his arms with the outside hose before entering his house and seeing his mother, then took a bath. The statement concluded at 11:48 p.m. Reeves was subsequently arrested for

aggravated kidnaping and first degree murder.

On December 13, 2001, a Calcasieu Parish grand jury indicted Jason Reeves for the first degree murder of M.J.T. Specifically, the indictment states: "JASON MANUEL REEVES committed the offense of first degree murder in that he killed M.J.T., a female juvenile whose date of birth was March 25, 1997, with the specific intent to kill or inflict **[**13]** great bodily harm upon M.J.T. and was engaged in the perpetration or attempted perpetration of aggravated rape and/or M.J.T. was under the age of twelve years." [10]

FOOTNOTES

10 Vol. 1, p. 235. Although Reeves was initially indicted for first degree murder and aggravated kidnapping, at a status conference held on May 21, 2004, prior to the retrial, the state *nol praised* docket number 20180-01, which had charged Reeves with kidnaping the victim. Vol. 11, p. 2656; Vol. 15, p. 3635.

At the guilt phase of this first degree murder trial, the state presented Reeves' [Pg 8] videotaped statements to the jurors and evidence discovered through investigation. A maroon t-shirt and jeans, which the defendant had worn on November 12, 2001, were seized from his house. Reeves' mother had washed them before the police seized the items. A picture of Reeves' vehicle, admitted into evidence, shows that the vehicle is a blue four-door, older model Oldsmobile Cutlass with a red sticker on the back window.

Two girls from the Moss Bluff school testified the defendant tried to talk to them on November 12, 2001. One of the girls, and the after-care provider who spoke with Reeves that day, identified him as the person who **[**14]** had been at the school near where M.J.T. disappeared.

In addition, an off-duty Lake Charles city police officer testified that he saw Reeves at the cemetery at 4:40 p.m. on November 12, 2001. The officer, who was meeting with a confidential informant at the cemetery between 4:15 p.m. and 4:45 p.m., saw the defendant walking back to his car and leaving the cemetery parking lot. As Reeves drove right next to the officer in leaving the area, the two men came face-to-face with each other. The **[*1040]** officer identified Reeves in court as the man he saw at the cemetery at 4:40 p.m. on November 12, 2001.

The state presented testimony that a man-trailing dog identified the scent of the victim inside Reeves' vehicle. The man-trailing dog also followed Reeves' scent to a wooden bridge off Charles Breaux Road, under which the pants and shoes of M.J.T. were found in a creek. At the cemetery, the man-trailing dog went toward the water, then toward the woods and over the fence from the cemetery to the area where there were wood shavings on the ground. From there, the dog went to the place where the victim was found. At that point, the dog started whining and crying, and refused to go further. At each location, **[**15]** the dog's handler was given no information.

[Pg 9] The state presented expert testimony that the purple fibers from the victim's

clothing matched fibers of vacuumed debris evidence from Reeves' vehicle. Hairs identified as dog hairs were found both in the defendant's vehicle and on the victim's clothing. During the recovery of evidence at the crime scene, maggots and an adult fly were recovered from the victim's body. An entomologist estimated that eggs were laid on the victim's body within one hour of her death and that the last time the eggs could have been laid considering their development was at approximately 5 p.m. on November 12, 2001.

The coroner testified that the approximate time of M.J.T.'s death was 4:30 p.m. The cause of death was found to be multiple incised stab wounds of the neck and trunk. M.J.T.'s neck had been cut nearly two-thirds of the way around. [11] In total, the victim had sixteen stab wounds, with fourteen on the front of her body and two on her back. Six of the stab wounds were in the area of the heart, while the heart itself was stabbed five times. The wounds to M.J.T.'s heart and back occurred while she was alive, although the stab wounds around her liver **[**16]** and mid-section occurred following death. There were long scrapes along the entire length of the victim's legs, which showed M.J.T. could have been dragged along the ground. Injuries on M.J.T.'s right hand were consistent with defensive wounds, showing that the little girl attempted to protect herself. Although she had been stabbed in the heart, the coroner believed M.J.T. would have survived for some time and would have suffered throughout the attack.

FOOTNOTES

[11] M.J.T.'s neck had a circumference of 9 1/2 inches. Her neck was cut 6 1/4 inch around.

M.J.T.'s body also showed she had been brutally sodomized while she was alive. Three visible scrapes and blood were visible on her anus. The forcible widening or opening of her anus was approximately three-fourths of an inch in [Pg 10] circumference. Her body showed blue bruising around her bottom, which the coroner stated could only occur when blood is pumping and the victim is alive. Semen was found in the victim's anus. An expert forensic analyst matched the semen obtained from a rectal swab of the victim to Reeves' DNA profile. The expert testified the probability of finding the same DNA profile from another Caucasian individual other than Reeves **[**17]** was calculated as 1 in 256 trillion.

After the state presented its evidence in the guilt phase, the defendant called, as a witness, an expert forensic psychologist, who testified as to his opinions regarding the reliability of the defendant's confession.

After deliberating, the jury unanimously found that the state had proven beyond a reasonable doubt that Reeves committed the first degree murder of M.J.T. After **[*1041]** allowing the statutorily-required time period to elapse, the penalty phase of the trial began.

At the penalty phase, the state introduced Reeves' prior criminal record, which included two juvenile adjudications for simple burglary and two adult convictions for indecent behavior with a juvenile, in 1996 and 1997, respectively. The victim of the 1996 conviction, N.T., testified that when she was 15 years old, the defendant drove

her in his truck to a park. He pulled her pants down as she struggled against him. N.T. stopped his assault only when she bit Reeves on the shoulder so hard that he bled. The record of the 1996 conviction shows that Reeves' victim, S.D., was a 7 year old child.

Further, the state presented testimony from a young girl, W. H., who described her encounter with **[**18]** Reeves on November 8, 2001, four days prior to M.J.T.'s disappearance and murder. W. H. stated that she was 13 years old on that date. She was walking to the office at Moss Bluff Middle School near the end of the school day [Pg 11] when Reeves, walking past her in the opposite direction, grabbed her bottom. She ran quickly to the school's office to get help.

The state also presented the testimony of Detectives Zaunbrecher and Primeaux of the CPSO. Both detectives testified that on December 10, 2001, Reeves had stated, in their presence, that he would not serve life in prison. While making a slitting motion across his neck, Reeves told the detectives that he would make them wish they had given him the death penalty if he did not get it. Reeves stated, "What are they gonna do, give me the -- give me life in prison twice?" [12] Further, Deputy Mandy Taggert, a CPSO transportation deputy, testified that Reeves told her that if he got out of jail, he would find another child and would kill again. Deputy Taggert stated that Reeves then began smiling and laughing after making that statement.

FOOTNOTES

12 Vol. 43, p. 10580.

The defense presented testimony from an expert in forensic psychology who asserted **[**19]** that Reeves suffers from major depression and mixed personality disorder, with borderline and anti-social personality traits. The defense expert testified that Reeves exhibits signs of dissociative amnesia stemming from chronic post traumatic stress disorder. The expert claimed that Reeves developed these disorders after witnessing his sister's death and being sexually assaulted as a young boy. Additionally, another defense expert determined that Reeves has an aggressive attitude and is prone to verbal and physical aggression. That defense expert testified, further, that the defendant also exhibits emotional instability, volatile interpersonal relationships, anger, mood swings and impulsivity. The defense expert did not find Reeves to be psychotic, schizophrenic, delusional or prone to hallucinations, or otherwise suffering from a mental illness.

The state's forensic psychology expert countered that, from a psychiatric or [Pg 12] psychological standpoint, he did not see a causative trigger which resulted in Reeves' criminal behavior. He did not feel that Reeves' actions in raping and murdering M.J.T. were a result of a post traumatic stress disorder. Rather, the state expert asserted **[**20]** that Reeves possessed the ability to discern and appreciate right from wrong. The state expert also discounted the defense expert's diagnosis of dissociative amnesia. According to the state expert, dissociative amnesia relates back to the traumatic events occurring previously in a person's life rather than to current memory lapses.

[*1042] After deliberation, the jury unanimously recommended that Reeves be sentenced to death, finding the victim was under 12 years old; the murder was

committed during the perpetration or attempted perpetration of an aggravated rape; and the offense was committed in an especially heinous, atrocious or cruel manner. After denying post-verdict motions, the trial court formally sentenced the defendant to death on December 10, 2004.

The defendant now appeals his conviction and sentence, raising 79 assignments of error. The court will discuss Assignments of Error 1-7 within the body of the main opinion. These claims raise questions regarding the defendant's counsel and are the only issues orally argued to this court. The remaining assignments of error, which have been determined to be without merit upon the application of well-established legal principles, are analyzed **[**21]** in an unpublished appendix which will comprise part of the record of this case on appeal. Finding no reversible error, we affirm Reeves' conviction of first degree murder and sentence of death.

LAW AND DISCUSSION

Assignments of Error 1 - 7

Attorney Issues

In these interrelated assignments of error, the defendant complains that he was [Pg 13] unconstitutionally denied counsel of his choice when the trial court removed non-local counsel, who represented him at his first trial through an agreement with the local indigent defender board, and reinstated originally appointed counsel, the local chief public defender, for his retrial. This replacement occurred after non-local counsel requested the court's involvement to secure reimbursement of expenses incurred in the defense of Reeves in the first trial, and to locate funding for expert assistance and attorney expenses for the retrial. The defendant additionally asserts the removal of non-local counsel resulted in representation by counsel who had an actual conflict of interest and who was so overburdened as to be constitutionally ineffective. The defendant maintains these actions resulted in structural error in his retrial, necessitating reversal **[**22]** of his conviction and sentence.

Prior Jurisprudence

Before discussing the merits of these issues, a brief review of this court's jurisprudence in the area of indigent representation and funding is useful. In the past, this court has noted, in general, the chronic underfunding of indigent defense programs in most areas of the state. *See State v. Peart*, 621 So.2d 780, 789 (La. 1993); *State v. Wigley*, 624 So.2d 425, 429 (La. 1993). In addition to underfunding, this court has recognized that caseload levels of attorneys working within indigent defense programs have, in certain situations, resulted in constitutionally ineffective assistance of counsel. *Peart*, 621 So.2d at 790. Although not applicable to this defendant's trial, the legislature recently addressed these issues in comprehensive legislation. [13] Prior to the passage of the legislature's reforms, this court, in cases [Pg 14] reviewed by this court, set forth certain principles and remedies through its constitutional authority and inherent power to ensure that effective assistance of counsel had been provided for indigent **[*1043]** defendants. These jurisprudential principles and suggested remedies were the guidelines used by the district **[**23]** court in connection with Reeves' retrial and form the framework of the district court's decisions.

FOOTNOTES

[13] In an effort to satisfy its constitutional mandate to "provide for a uniform system for securing and compensating qualified counsel for indigents," *see* La. Const. art. 1, § 13, the legislature implemented statewide standards and guidelines for indigent defense through the Louisiana Public Defender Act of 2007. *See* Acts 2007, No. 307, eff. August 15, 2007; *and* La. R.S. 15:141-184. None of the provisions of the 2007 Act are at issue here.

State v. Peart

In 1993, in *State v. Peart, supra,* this court considered a multifaceted ruling made by a criminal district court judge in Orleans Parish based on that judge's examination of the defense services being provided to indigent defendants in that section of court by the public defender's office. The trial judge ruled that three statutes regarding indigent defense and its funding were unconstitutional as applied in the City of New Orleans. In addition, the trial judge ordered that the legislature provide funding for improved indigent defense services and ordered a reduction in the caseloads of those attorneys representing indigent defendants in **[**24]** that section of court. *Peart,* 621 So.2d at 783.

This court reversed the district court's ruling, finding that the statutes at issue were not unconstitutional and that the remedies ordered by the trial judge were inappropriate at that time. *Id.* However, in *Peart,* this court made several important pronouncements regarding the funding of indigent defense and the caseloads of those attorneys providing defense to the indigent, which are pertinent to the issues raised in the instant matter.

In *Peart,* this court held, *inter alia,* that [HN3] a defendant may raise certain ineffective assistance of counsel claims, prior to trial, when judicial economy demands it. *Id.,* 621 So.2d at 787. Additionally, the court held that a trial judge must make findings individually tailored to each defendant with regard to the [Pg 15] representation he received or was receiving. *Id.,* 621 So.2d at 788. The court also held, after a detailed review of the lack of funding and excessive caseloads of the indigent defenders in that particular section of Orleans Parish Criminal District Court, that defendants who were assigned counsel in that section received constitutionally deficient counsel. *Id.,* 621 So.2d at 790. So finding, **[**25]** the court further held that a rebuttable presumption of counsel's ineffectiveness could be applied in cases arising out of that section of court. *Id.,* 621 So.2d at 791. Finally, the court warned:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.

Id., 621 So.2d at 791. The court remanded the case to the district court for retrial of the "Motion for Relief" filed on behalf of defendant, *Peart,* and for trial of other motions filed by indigent defendants in that section of court asserting pretrial claims

of ineffective assistance of counsel. *Id.*, 621 So.2d at 791. In fashioning a remedy, this court instructed the district court:
If the court, applying this presumption [of counsel ineffectiveness] and weighing all evidence presented, finds that Leonard *Peart* or any other defendant in [that section] is not receiving the reasonably effective assistance of counsel the constitution **[**26]** requires, and the court finds itself unable to order any other relief which would remedy the situation, then the court shall not permit the prosecution to go forward until the defendant is provided with reasonably effective assistance of counsel.
Id., 621 So.2d at 791-792.

Stale v. Wigley

While *Peart* dealt with a local public defender's office representing indigent defendants, **[*1044]** the case of *State v. Wigley*, 624 So.2d 425 (La. 1993), decided the same year as *Peart*, concerned the appointment of attorneys from the private bench to represent indigent defendants. In *Wigley*, the court reaffirmed that the [Pg 16] HN4 "[u]ncompensated representation of indigents, when reasonably imposed, is a professional obligation burdening the privilege of practicing law in this state, and does not violate the constitutional rights of attorneys." *Id.*, 624 So.2d at 426. However, in order for the appointment to be reasonable, and not oppressive, the court also held that "any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs." *Id.*, 624 So.2d at 429. The court charged the district **[**27]** judges with the authority to determine, in their discretion, what would constitute an unreasonable level of time that an attorney must devote to a particular case without compensation of a fee. "Such a system will strike a balance between the attorney's ethical duty to provide services *pro bono publico* and his or her practical need to continue to perform his or her other obligations." *Id.*, 624 So.2d at 429.

The court in *Wigley* levied another charge on the district courts. While acknowledging the fact that the source of funds from which appointed counsel may be reimbursed were, at that time, limited, the court directed the district judges to make the initial determination, before counsel is appointed, that sufficient funds "to cover the anticipated expenses and overhead are likely to be available to reimburse counsel." *Id.*, 624 So.2d at 429. Moreover, the court instructed that "[i]f the district judge determines that funds are not available to reimburse appointed counsel, he should not appoint members of the private bar to represent indigents." *Id.* Recognizing the harshness of this remedy, the court nevertheless maintained that "budget exigencies cannot serve as an excuse for the oppressive **[**28]** and abusive extension of attorneys' professional responsibilities." *Id.*

[Pg 17] *State v. Touchet*

Peart and *Wigley* set forth remedies to ensure constitutionally-required assistance of counsel for indigent defendants. HN5 In addition to the right to counsel, an indigent defendant must also have a fair opportunity to present his defense. *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985). This often requires the assistance of expert witnesses. When a defendant is indigent, he must obtain funding to pay for this expert assistance. However, in requesting certain types of expert assistance, the defense may be divulging important trial strategies.

In *State v. Touchet*, 1993-2839 (La. 9/6/94), 642 So.2d 1213, the court considered whether, and to what extent, indigent defendants were entitled to *ex parte* hearings on their motions for state-funded expert witness services. In making its determination, the court sought to provide an indigent defendant a fair opportunity to present his defense while maintaining an adversary system. The proper balance is achieved by the court's holding:

HN6 ". . . an indigent defendant may file a motion for expert junding *ex parte*. Notice of the filing **[**29]** of the motion should be given to the state, which may file an opposition to the hearing being held *ex parte* and/or to the request for funding. The trial court should first determine, *in camera*, either on the face of the allegations of the motion or upon taking evidence at an *ex parte* hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory **[*1045]** hearing. If so, then the hearing on expert funding should continue *ex parte*. If not, then the hearing should be held contradictorily with the District Attorney. ...

HN7 "At the hearing on expert funding, whether *ex parte* or contradictory, the defendant must first show a need for the funding. The defendant must show with a reasonable degree of specificity what type of expert is needed and for what purpose. In other words, the indigent defendant requesting governmental funding for the securing of expert assistance must show that it is more likely than not that the expert assistance will be required to answer a serious issue or question raised by the prosecution's or defense's theory of the case. If the defendant meets this burden, then the court is to order that the funds be provided by the state. If the defendant **[**30]** fails to meet this burden, and the proceedings were held *ex parte*, both the written reasons for denial and [Pg 18] the record of the proceedings are to remain under seal during the pendency of the defendant's prosecution, including appellate review.

Touchet, 1993-2839 p. 14-15, 642 So.2d at 1221.

In *Touchet*, this court recognized that HN8 a district court must use its discretion in its decisions regarding the funding of expert assistance for indigent defendants. While noting that the state's substantial interest in protecting the public fisc demands that some form of opposition by the state be allowed, *Touchet* declared the district court to be an adequate guardian of the state's financial interests from frivolous requests for the funding of expert assistance. *Id.*, 1993-2839 p. 12, 642 So.2d at 1220-1221.

State v. Citizen

Finally, the case of *State v. Citizen c/w State v. Tonguis*, 2004-1841 (La. 4/1/05), 898 So.2d 325 ("*Citizen*") is important in this review. Although *Citizen* was handed down a few months after Reeves' retrial, these consolidated cases involved the separate prosecutions of two indigent capital defendants arising out of Calcasieu Parish, the same parish as Reeves' prosecution, **[**31]** and present an informative analysis of the mechanism for funding indigent defense prevailing at that time within that parish.

In *Citizen*, a parish-approved *ad valorem* tax constituted the largest component of the parish Criminal Court Fund, which maintained the court system and the District Attorney's Office, but not the local public defender's office. This fund operated at a surplus. By contrast, the local public defender's office was funded through court fees and an allocation of state funds and operated at a deficit. Expressing frustration at the continued lack of funding in criminal cases, and faced with appointed defense

counsel's Motion to Determine Source of Funds to Provide Competent Defense, the district court in *Citizen* declared unconstitutional two statutes that had recently been [Pg 19] amended to prevent the use of local parish funds to pay for appointed defense counsel. The district court further ordered the parish police jury to provide funds for appointed counsel for the two indigent capital defendants. [14]

FOOTNOTES

14 The history of the amendment of these two statutes is set out fully in *Citizen*, 2004-1841 p. 8-10, 898 So.2d at 331-333. Briefly, in *State v. Craig*, 1993-2515 (La. 5/23/94), 637 So.2d 437, **[**32]** this court held that the extant version of La. R.S. 15:304, governing expenses paid by the parishes, could be used as a source of supplemental funding for counsel and expert witness fees in cases in which the resources of the local Indigent Defender Boards were exhausted. Three months after *Craig* was handed down, the legislature amended the statute. La. R.S. 15:304, as amended in 1994, added the following provision: HN9 "Nothing in this Section shall be construed to make the parishes ... responsible for the expenses associated with the costs, expert fees, or attorney fees of a defendant in a criminal proceeding." In the same legislation, the legislature deleted language from an earlier version of La. R.S. 15:571.11(A)(1)(a), which had formerly provided for the parish criminal court fund to pay the expenses of attorneys appointed to represent indigent persons under any public defense program.

[*1046] On appeal, this court reversed, upholding the constitutionality of the statutes. The court held that the legislature, through statute, places the burden of paying indigent defense costs on the state. The fact that the legislature failed to adequately fund indigent defense programs, and had, in the amendments **[**33]** to the statutes at issue, eliminated an alternative source of funding from the parishes, did not "diminish any of the constitutionally guaranteed rights and freedoms of these defendants or of their attorneys." *Citizen*, 2004-1841 p. 13, 898 So.2d at 335. Further, the court held the district court erred in ordering the police jury to place funds into the court registry for court-appointed attorneys or other case-related expenses when the legislature had made unmistakably clear that HN10 the state, and not the parish, was responsible for indigent funding. *Id.*, 2004-1841 p. 14, 898 So.2d at 336.

In addition to these holdings, the court reiterated, from its previous pronouncements in *Peart* and *Wigley*, that HN11 "budget exigencies" could not serve as an excuse for the oppressive or abusive extension of attorneys' professional responsibilities. *Citizen*, 2004-1841 p. 15, 898 So.2d at 336. Moreover, in order to ensure that indigent defendants are provided with their constitutional and statutory rights to counsel and to expert assistance, this court had, in the past, exercised its [Pg 20] constitutional and inherent power and supervisory jurisdiction to impose corrective

measures. In fact, the court warned **[**34]** previously in *Peart* that more intrusive measures would be contemplated if the legislature failed to act. *Id.*

Although the court in *Citizen* noted that the legislature had taken positive steps since *Peart* to remedy the critical state of indigent criminal defense in Louisiana, there had been, as of that time, no resolution or legislative remedy for the underfunding and overworked conditions noted in previous cases. *Id.*, 2004-1841 p. 14-15, 898 So.2d at 336. Finding that further corrective measures were needed to address the immediate problems of the instant defendants, the court in *Citizen* altered one of the rules set forth in *Wigley*.

Whereas in *Wigley* the court maintained that a district court should not appoint private counsel for an indigent defendant until a funding source was identified for the reimbursement of, at a minimum, the appointed counsel's expenses and overhead, the court in *Citizen* ordered that HN12 counsel be appointed for an indigent defendant from the time of the indigent defendant's first appearance in court, "even if the judge cannot then determine that funds sufficient to cover the anticipated expenses and overhead are likely to be available to reimburse counsel." *Citizen*, 2004-1841 p. 16, 898 So.2d at 338 **[**35]** . The court instructed that counsel appointed before a funding source was identified could subsequently file a motion to determine funding. Thereafter, if the district court determined that adequate funding was not available, this court authorized the defendant to file a motion to halt the prosecution until adequate funding became available. *Id. Citizen* authorized district judges, in their discretion, to prohibit the state from proceeding with a prosecution **[*1047]** until he or she would be able to determine that appropriate funding was likely to be available thereafter. *Id.*, 2004-1841 p. 16, 898 So.2d at 339.

[Pg 21] This authority is no longer a matter of jurisprudential rule announced in *Citizen*. In its comprehensive revision of the statutory provisions establishing and regulating a state-wide indigent defender board, the legislature, HN13 in the Louisiana Public Defender Act of 2007, La. Acts 2007, § 307, explicitly recognized that *Citizen* "authorized trial judges to halt prosecutions in capital cases, upon motion of defense counsel, until adequate funding is provided to ensure an adequate defense, and it is the express intention of the legislature to ensure adequate **[**36]** resources, consistent with the *Citizen* opinion, which allow prosecutions in such cases to continue to conclusion resulting in verdicts that are fair, correct, swift, and final." La. R.S. 15:142(D). As previously noted, our decision in *Citizen* was rendered several months after the retrial of the instant case.

Facts Pertinent To Funding And Representation In This Case

With this jurisprudential review in mind, we turn to the facts pertinent to the issues raised in these assignments of error. The record shows that the Calcasieu Parish grand jury indicted Reeves on December 13, 2001. The district court determined that the defendant was indigent and the Calcasieu Parish Public Defender's Office was appointed to represent him. At arraignment, the Chief Public Defender of the parish, Ronald Ware, tendered a plea of not guilty on Reeves' behalf. [15] At that time, Ware informed the court that attorney David Ritchie would serve as co-counsel. [16] For several months, from January through March, 2002, Ware and Ritchie represented the defendant, filing preliminary discovery motions and appearing on his behalf at hearings. [17]

FOOTNOTES

15 Vol. 13, p. 3141.

16 Vol. 13, p. 3143.

17 *See* Vol. 13, p. 3145. Ware represented **[**37]** Reeves at a hearing on the State's response to the defense motion for discovery and inspection held on March 13, 2002.

[Pg 22] Thereafter, the Calcasieu Parish Public Defender's Office, through the parish's Indigent Defender Board, contracted with attorney Kerry Cuccia of the Capital Defense Project of Southeast Louisiana ("Capital Defense Project"), and members of his staff, to represent Reeves in his capital trial. [18] According to documents filed later under seal, the original contract contemplated that the Capital Defense Project would be paid by the parish's Public Defender's Office/Indigent Defender Board the amounts of $ 50,000 for attorney fees and $ 25,000 for expert witness fees. The amount agreed upon for expert witness fees was subsequently raised by an additional $ 10,000, to a total of $ 35,000.

FOOTNOTES

18 An affidavit by Ronald Ware, attached as an exhibit to a motion filed under seal, indicates that Cuccia, along with other attorneys and investigators on his staff, represented the defendant beginning March 28, 2002. *See* Motion To Stay Proceedings For Lack Of Funds To Provide A Competent Defense, date-stamped March 25, 2004, Exhibit 8-Affidavit of Ronald Ware, Box Labeled "All Documents **[**38]** Under Seal." The record shows that Cuccia filed a Motion to Enroll as counsel of record on April 11, 2002. Vol. 3, p. 594. The motion was granted on that same date by Judge Minaldi, who was then the presiding judge. Graham da Ponte filed a Motion to Enroll as counsel of record on July 29, 2002. Vol. 4, p. 941. The motion was granted on August 5, 2002. *Id.*

Reeves' first trial, with Cuccia, Graham da Ponte and Hilary Taylor acting as counsel, and presided over by Judge Quienalty, began with jury selection on October 27, 2003 and ended on November 9, 2003, **[*1048]** when a mistrial was declared due to the jury's inability to reach a unanimous verdict on guilt. [19]

FOOTNOTES

[19] *See generally* Vol. 1, p. 59-109. The court minutes from the first trial reflect that the jury deadlocked when it was unable to reach a unanimous verdict at the guilt phase; 11 jurors would have found the defendant guilty of first degree murder and 1 juror would have found the defendant guilty of second degree murder. *See* Vol. 1, p. 109; *see also* Vol. 11, p. 2632.

After the trial, by letter dated November 25, 2003, Cuccia informed Ware that the defense of Reeves had been more costly than anticipated. [20] Although the local Public Defender's **[**39]** Office/Indigent Defender Board provided a total of $ 85,000 for Reeves' defense in the first trial, as agreed upon, the actual cost was $ 120,537.08.

FOOTNOTES

[20] *See* Motion To Stay Proceedings For Lack Of Funds To Provide A Competent Defense, date-stamped March 25, 2004, Exhibit A-Letter dated November 25, 2003 from Kerry Cuccia to Ronald Ware, Box Labeled "All Documents Under Seal."

In requesting reimbursement of the overage from Ware, Cuccia included a [Pg 23] breakdown of the actual costs. None of the total amount requested included attorney fees. However, the attorneys who participated in Reeves' defense sought reimbursement from the Public Defender's Office/Indigent Defender Board of expenses, specifically mileage, lodging, meals and unspecified other expenses. In addition, the itemization of costs from the first trial reflected that the total amount requested for the overage also consisted of fees for expert witnesses, fees for general and mitigation investigation, and litigation expenses.

On January 7, 2004, soon after Cuccia's request to Ware for reimbursement, the district court set a new trial date of June 14, 2004. The district court also set motion dates for the retrial, and ordered **[**40]** that Cuccia and da Ponte be notified. The defense subsequently filed several motions addressing the funding issues which had arisen. [21] On February 18, 2004, defense counsel and the state participated in a telephone conference with Judge Canaday, the judge now presiding over the matter. A minute entry of February 19, 2004 reflects that Cuccia agreed to submit to the court an *ex parte* itemized statement of expenses from the first trial.

FOOTNOTES

[21] The defense filed motions entitled "Motion for New Trial Date," "Motion To Determine Source Of Funds To Provide Adequate Defense for Funding," and "Motion To Provide Funds Owed."

By letter dated February 19, 2004, Cuccia submitted to the court, under seal, an

itemization of expenses and expenditures from the first trial, reflecting a balance owed the Capital Defense Project of $ 35,537.08. Cuccia also submitted, under seal, an estimate of $ 19,000 needed immediately for expert witnesses to begin work on the upcoming retrial, with a total estimate of $ 108,000 for both attorney expenses and expert witness fees for the retrial. None of the estimated cost of the retrial included an amount for attorneys' fees; the Capital Defense Project attorneys only estimated **[**41]** reimbursement of anticipated expenses.

[Pg 24] On March 8, 2004, Cuccia filed a "Motion to Stay Proceedings For Lack Of Funds to Provide A Competent Defense," asserting that the defense was unable to prepare for trial scheduled to begin on June 14, 2004. [22] In the motion, Cuccia asserted that counsel could not prepare and present a competent defense for Reeves due to the facts that: (1) the defense **[*1049]** was owed a significant amount of money for unpaid expenses from the first trial, and (2) had received no money with which to fund the retrial. With regard to the unpaid expenses from the first trial, Cuccia maintained that the defense had been assured that all expenses would be paid by the Calcasieu Parish Public Defender's Office. However, the defense was now informed that no funds existed for reimbursement from that source. With regard to the money for retrial, Cuccia acknowledged in the motion apparently behind-the-scenes efforts of the district judge to obtain funds, but maintained that the defense had no money to proceed. Due to this state of affairs, Cuccia moved to stay the proceedings. Exhibits to the motion were filed under seal.

FOOTNOTES

22 *See* Motion To Stay Proceedings For Lack Of Funds **[**42]** To Provide A Competent Defense dated March 8, 2004, Box Labeled "All Documents Under Seal."

Hearing On Funding Issues

On March 23, 2004, a hearing was held on the defense's funding motions. In attendance before Judge Canaday were Cuccia and da Ponte, Reeves' present counsel; Ware, Reeves' originally appointed counsel; Walt Sanchez, as counsel for Ware individually; and the state. After introducing himself and his co-counsel, da Ponte, to Judge Canaday, whom they had never before met, Cuccia submitted the matter to the court on the motion and the attachments which were provided to the court under seal. [23]

FOOTNOTES

23 The question whether Judge Canaday's ruling removing counsel and substituting originally-appointed counsel had a retaliatory basis is negated by the fact that Judge Canaday did not preside over Reeves' first trial and met Cuccia and da Ponte for the first time at the March 23, 2004 hearing.

[Pg 25] Judge Canaday stated for the record that there had been a number of

informal conferences between the court and counsel concerning the funding issue, and that the judge had made no secret of the fact that the court was contemplating taking "some significant action to make some changes...". [24] **[**43]** After reviewing an affidavit from Ware regarding the financial standing of the Calcasieu Parish Public Defender's Office and a bank statement to which the court was privy, and reviewing the caseload and structure of the local Public Defender's Office, Judge Canaday agreed with Cuccia that "... at this time that there are not sufficient funds based on, at least, the application that was made by Defense counsel." [25]

FOOTNOTES

24 1st Supp. Vol. 4, p. 817.

25 *Id.*

Judge Canaday emphasized that the court had not made an independent review of the expenses submitted under seal from the first trial, nor was the court ever called upon to do so in the past, because those expenses were based on an agreement between the local Public Defender's Office/Indigent Defender Board and the Capital Defense Project. [26] At this time, however, due to the fact that the prior expenses had not been paid and because funds for future expenses and fees would have to be obtained for the retrial, Judge Canaday stated his appreciation that the matter had now been brought before the court in order for the court to take on a management role in the case, *i.e.*"... to view specific requests and allocation of funds that its [sic] deemed appropriate **[**44]** under the existing case law and Constitutional guidelines." [27]

FOOTNOTES

26 *Id.*

27 *Id.*, p. 818.

Judge Canaday announced the court had indicated, previously and informally, that due to its fiduciary obligation to manage the retrial, the court was considering relieving Cuccia and da Ponte, who were counsel located in New Orleans, of any **[*1050]** [Pg 26] further responsibility for the defense of Reeves, due to the ability of qualified local counsel to represent Reeves for the retrial. Both Cuccia and da Ponte acknowledged their familiarity with the court's proposal. [28] For the record, Ware responded, when asked by the court, that there was no conflict whatsoever which would prevent the local Public Defender's Office from representing Reeves. [29]

FOOTNOTES

28 *Id.*, p. 818-819.

[29] *Id.*, p. 819.

Judge Canaday related his understanding that, in the prior trial, the representation by Cuccia and da Ponte was based on a contractual agreement between the parish's Public Defender's Office and the Capital Defense Project. [30] Based on the motions filed by these defense counsel, and their exhibits filed under seal, the court believed that the Public Defender's Office lacked the funds to advance or to maintain the same contractual relationship **[**45]** the Public Defender's Office formerly had with the Capital Defense Project, especially considering the nearness of the upcoming June trial date. [31]

FOOTNOTES

[30] *Id.*, p. 819. Ware clarified the record at this point to state that the decision to contract out the case to the Capital Defense Project was actually made by the parish's Indigent Defender Board. 1st Supp. Vol. 4, p. 819-820.

[31] *Id.*, p. 821.

Before making a definitive ruling, however, Judge Canaday wished to establish a record and to obtain evidence. Upon direct questioning by the court, Cuccia agreed that he had not received enough financing from the Public Defender's Office to be prepared for the June trial date. [32] Cuccia also explained that the Capital Defense Project was still owed more than $ 35,000 from the previous trial, and had received no assurances from the Public Defender's Office that the Capital Defense Project [Pg 27] would receive funds in order to be ready for trial. [33]

FOOTNOTES

[32] *Id.*, p. 823.

[33] *Id.*, p. 823-824.

Ware told the court that the Indigent Defender Board, as of that date, maintained a balance of approximately $ 18,846.50 in its Capital Defense Account. [34] When the court asked Ware if Ware would be able to fund Cuccia in the **[**46]** same manner as Cuccia had been funded previously, to enable Cuccia to prepare for a trial currently scheduled in two and a half months, Ware responded, "No, sir, your Honor." [35] Ware explained that, for the entirety of Cuccia's previous representation, Ware paid invoices when they were presented by Cuccia. Ware stated that his office had, in fact, paid Cuccia a total of $ 85,000 to this point, as agreed. However, Cuccia had contacted Ware's office, both in writing and orally, as described earlier, advising Ware and the Indigent Defender Board that Cuccia had an overrun of about $ 35,000. [36]

FOOTNOTES

[34] *Id.*, p. 824.

[35] *Id.*

[36] *Id.*, p. 824-825.

Ware testified that he told Cuccia that the Indigent Defender Board was not in a position "then or now" either to reimburse the Capital Defense Project for the money it had already expended for Reeves' first trial or to fund a retrial. [37] As Ware stated: **[*1051]** "[a]nd as it stands now, we have a serious problem with funding any capital litigation in terms of a defense in any of the cases that are pending before this Court [Pg 28] and this district." [38] Ware assured the court that the Indigent Defender Board and Public Defender's Office were very satisfied with the defense **[**47]** presented by the Capital Defense Project and would willingly reimburse Cuccia and fund a retrial if funds were available. [39]

FOOTNOTES

[37] We note that Ware testified in a funding hearing in the *Citizen* case held a little over a month before the hearing held in *Reeves*. At the January 30, 2004 hearing in *Citizen*, this court found "Chief Public Defender Ware underscored the problem facing the court by stating that his office currently owed close to $ 47,000 for capital defense and expected to owe at least an additional $ 150,000 in upcoming cases which he had already committed to fund." *Citizen*, 2004-1841 p. 4, 898 So.2d at 328. We know from the facts of this case that over $ 35,000 of the amount owed and $ 108,000 of the anticipated costs may have been for the *Reeves* case, as Ware was aware of the overage of expenditures for the first trial and the anticipated costs of retrial by Cuccia's November correspondence.

[38] 1st Supp. Vol. 4, p. 825. Although a different district judge presided in the *Citizen* case, this court noted that "[t]he court expressed its frustration with the continued lack of funding [for capital indigent defense in Calcasieu Parish] and the fact that it faces some version of the **[**48]** same finding dilemma in virtually every criminal case before it." *Citizen*, 2004-1841 p. 4, 898 So.2d at 329.

[39] 1st Supp. Vol. 4, p. 825.

Aware of the district court's proposed resolution of the funding dilemma, Ware objected to replacing counsel at this time due to the on-going attorney-client relationship which the Capital Defense Project attorneys had developed with Reeves. Ware acknowledged, however, "I understand all of the pitfalls and other things that are involved with this case and the other capital cases pending in this Court." [40] He candidly admitted that he did not have "an easy or ready solution" to the problem that was before the court. [41]

FOOTNOTES

40 *Id.*

41 *Id.*

Both Ware and Cuccia reiterated to the court that the Capital Defense Project was not seeking attorneys' fees for its representation of Reeves. Cuccia, on behalf of the Capital Defense Project, sought only reimbursement of expenses paid for the first trial, and included travel expenses as the only counsel expense in his estimate of retrial costs. [42] Turning to the subject of expenses, Judge Canaday observed that, without going into detail regarding the information filed under seal, he felt there had been a substantial amount **[**49]** of money associated with travel and associated expenses for Cuccia and his staff from Reeves' prior defense. Cuccia agreed, responding:
[Pg 29] That's correct, Your Honor. It took a lot of time and effort to travel back and forth from New Orleans here during the investigative stage of the case, and also to basically relocate the entire Defense team first to Baton Rouge for a week and then here for a week. [43]

FOOTNOTES

42 *Id.*, p 828.

43 *Id.*, p. 829. As with the retrial, the jury for the first trial was picked in Baton Rouge and transported to Calcasieu Parish for the remainder of the trial.

Based on the totality of the information before him, Judge Canaday concluded that sufficient funds were not available for a retrial to begin during the month of June of 2004, as previously set. [44] Since the financial situation necessitated that the trial date be moved anyway, Judge Canaday determined it was necessary to reassess and reevaluate the financial situation regarding counsel for the retrial. Judge Canaday suggested replacing existing non-local counsel with the capital-certified Ware, the local Chief Director of the Public Defender Office, and local attorney, Charles St. Dizier, as second-chair, provided **[**50]** **[*1052]** he was associate-counsel certified. [45] Before doing so, however, Judge Canaday asked to hear from Sanchez, as counsel for Ware; Cuccia and da Ponte, as existing counsel; and the prosecutor. [46]

FOOTNOTES

[44] *Id.*, p. 829.

[45] *Id.*, p. 829-830. Ritchie, the original second-chair appointed by the court, had been elected to a judgeship in the 14th Judicial District in the time period between the first trial and the March, 2004 hearing. Consequently, then-Judge Ritchie was not available to be re-appointed second-chair counsel for Reeves' retrial. *See* Vol. 17, p. 4169, 4173.

[46] 1st Supp. Vol. 4, p. 830.

Cuccia told the court that the Capital Defense Project stood ready to continue its representation of Reeves, provided the funds they requested to present a proper defense be provided sufficiently in advance of trial, as well as reimbursement of the more than $ 35,000 which was advanced out of the Capital Defense Project budget for the previous trial. [47] Cuccia explained that the overage from the previous trial occurred when counsel realized they would run short of money. Rather than delay the trial, and with the assurance from Ware that money would ultimately be available [Pg 30] to reimburse him, Cuccia took **[**51]** upon himself the responsibility of paying those additional expenses out of his own budget rather than upset the trial date. Otherwise, Cuccia indicated he would have asked for a stay prior to the first trial, due to insufficient funds to continue. [48] Cuccia agreed with Judge Canaday that, since the Public Defender's Office had paid the previous invoices when submitted, there had been no prior application for an *in camera* determination whether the expert expenses of the first trial were appropriate or reasonable. [49] Da Ponte stated that her position was the same as Cuccia's with regard to this matter. [50]

FOOTNOTES

[47] *Id.*

[48] *Id.*, p. 831-832.

[49] *Id.*, p. 832.

[50] *Id.*

When asked his position, the prosecutor asserted the state's view that the matter should be brought to trial as expeditiously as possible for the sake of the victim. [51] Otherwise, the state had no comment on the issue of Reeves' counsel for the retrial.

FOOTNOTES

[51] *Id.*, p. 832-833.

Walt Sanchez, separate counsel for Ware, objected to Ware being substituted as counsel in this case. [52] Sanchez argued that Ware could not ethically represent Reeves due to his otherwise heavy caseload, and that the re-appointment of Ware would interfere with the attorney-client **[**52]** relationship which Reeves had developed with the Capital Defense Project attorneys. [53] Sanchez maintained that the case could not go forward until a definite funding source was identified and that neither Ware [Pg 31] nor the Capital Defense Project attorneys could represent Reeves until that was accomplished. According to Sanchez, there would be a violation of *Peart* if Ware were appointed to represent Reeves, due to his burdensome caseload as the Chief Public Defender, and there would be a violation of *Wigley* if the court maintained the representation of the Capital **[*1053]** Defense Project's attorneys, because private appointed attorneys would not be assured of reimbursement of their overhead and expenses. [54]

FOOTNOTES

[52] *Id.*, p. 821-822. Sanchez's presence at the hearing supports Judge Canaday's earlier statement for the record that there had been several informal discussions by all parties about possible solutions to the lack of funding dilemma. Neither Ware, nor Sanchez, who presented argument on the issue, was surprised by Judge Canaday's proposed solution to remove non-local appointed counsel and to replace them with the capital-certified local Chief Public Defender.

[53] stipulation was entered as **[**53]** to what Ware would testify was his current caseload. 1st Supp. Vol. 4, p. 833-836.

[54] *Id.*, p. 821-823, 837-845, 850-852.

After ascertaining that counsel had no further argument, Judge Canaday reiterated "... the Court is going to take much more significant action rather than to just stay the proceedings, as previously indicated." [55] In addition to rescheduling the trial date from June 14, 2004 to October 11, 2004, and refixing motion dates in advance of the new trial date, Judge Canaday removed Cuccia and da Ponte of the Capital Defense Project as counsel for Reeves, re-appointed Ware as lead trial counsel to represent Reeves for the upcoming motions and trial, and tentatively appointed St. Dizier as second-chair associate counsel to assist Ware. [56] The court explained:
The Court specifically notes that it was not involved in the original appointment and it's now become necessary to make significant decisions involved in not only the scheduling and hearing of this case but also with regard to funding matters because of situations involved with our Public Defenders' system.

Mr. Ron Ware who previously was assigned to a specific division no longer has that. He now has the ability to handle **[**54]** high-profile cases as well as cases of his choice and would indicate that whatever priority he assesses those cases is within his own province, noting that he has a staff of felony defenders that can take many of the cases that he has been assigned in order to proceed.

Him being local the hearings can be scheduled with rather short-term necessity as need be for funding issues.

[Pg 32] The Court finds that there will be significant savings, not only with the transportation and other living expenses of out of town counsel, but additional expenses that may be saved in the close monitoring and regulating of experts as dictated under the *State v. Touchet* jurisprudence for the State, and *Ake versus* - that's spelled A-k-e. ... *Oklahoma* jurisprudence. Further the Court has privy of the expenditures of the first trial and would set up conference with Defense counsel to go through and discuss those funding needs for the upcoming October date at Defense counsel's convenience.

The Court has also made a decision that the Public Defenders' Office, specifically Mr. Ron Ware, has an established relationship with the defendant, and it will be easy for him to walk in and take over these proceedings from the **[**55]** Capital Defense Project. [57]

It is this Court's position that if it is going to be called upon to secure and allocate the funding that's necessary to proceed and move this case along then it will also regulate that as the law requires.

The Court makes this decision in order to move the matter for trial. It is noted that this matter needs to be moved along, that the victims have requested that the matter be moved along, that the case has already been upset on one occasion for funding.

[*1054] And the Court will seek and obtain the appropriate assistance if Defense counsel establishes that it is necessary so that the October date will be maintained. [58]

FOOTNOTES

[55] *Id.*, p. 855.

[56] *Id.*, p. 856-857.

[57] As will be discussed later in this opinion, Reeves attempted to escape from jail while incarcerated for the instant capital murder charge. Ware represented Reeves at an earlier trial on the charge of attempted simple escape.

[58] 1st Supp. Vol. 4, p. 857-859.

Sanchez, on behalf of Ware, objected to the court's ruling and gave notice of his intent to seek a writ of review. [59]

FOOTNOTES

[59] *Id.*, p. 859.

Ware indicated he had two additional comments which he wanted placed on the record, and which the court could consider in the nature **[**56]** of a request to reconsider its ruling. First, Ware stated that none of the other nine attorneys in his office had experience with defending a person accused of a crime which carried a mandatory life sentence. Consequently, he felt compelled to be involved in the trial of every case in which his office defended someone accused of a crime which carried a mandatory [Pg 33] life sentence. Second, Ware informed the judge that the time he spends on a capital case is billed against the Capital Defense Fund Account maintained by the Indigent Defender Board, which is over and above his salary as a public defender. As Ware explained, that money would go into his office's account to fund non-capital clients. [60] Judge Canaday responded that Ware's statement about the internal accounting operations within the public defender organization were subject to its own internal ethical considerations and auditing requirements. The court did not have a comment on that aspect put forth by Ware, "as long as it's not an issue that's brought before the Court." [61]

FOOTNOTES

[60] *Id.*, p. 859-860.

[61] *Id.*, p. 861.

Cuccia entered an objection, on behalf of Reeves, to the court's decision to remove him and da Ponte as Reeves' counsel. **[**57]** [62] However, Cuccia did not object to the court's ruling on his own behalf nor on the behalf of the Capital Defense Project. Similarly, da Ponte failed to object to the ruling on her own behalf or on behalf of the Capital Defense Project.

FOOTNOTES

[62] *Id.* In subsequent status conferences, Reeves requested and was granted the opportunity to place on the record his objection to the substitution of counsel. At a June 18, 2004 status conference, Reeves told the court:

I just - I want to make it re-known that I object to my - Kerry Cuccia and Graham daPonte being taken off my case. They've been on it for two years and I've come to trust them and I can't see how Mr. Ware can be ready for trial in October, and I

can't trust him to talk to him like I've done my other attorneys. There's no - I can't - I don't trust them. I'd rather my other attorneys..Vol. 15, p. 3703.

At that time, the court noted Reeves' objection. Reeves clarified: "It's not that I don't trust him or doubt his, you know, ability to represent me in trial, I just - I'm more comfortable with my other attorneys." Vol. 15, p. 3704. When the court asked: "If you had a choice you'd rather have Mr. Cuccia is what you're saying," Reeves responded, **[**58]** "Yes, sir." *Id.*

Judge Canaday then informed Sanchez that he could either directly seek a writ of review from the court's ruling as it now stood, or Sanchez could submit a brief on the constitutional issue regarding the attorney-client relationship in the form of a [Pg 34] reconsideration. If the court denied the reconsideration, then the court indicated Sanchez would be allowed time to seek review of all of the issues at once, if that was what the defense deemed appropriate. [63] Sanchez asked for a clarification of the court's ruling, for the purpose of ascertaining exactly which issues the court had ruled on, for review purposes. Judge Canaday clarified that the court would remain **[*1055]** silent on the *Peart* aspect of the argument because, based on what had been presented, the court did not feel that any comment was required. [64]

FOOTNOTES

[63] *Id.*, p. 862.

[64] *Id.*; p. 863. Later in the hearing, Sanchez remarked that the court seemed very certain in its position to appoint Ware, trying to discover whether there was a chance Judge Canaday would reconsider his appointment of Ware on the attorney-client issue, and whether a motion for reconsideration would be successful. Judge Canaday stated: "It would probably **[**59]** have to be something much more substantial in black letter law more than what I'd received here in open court, Mr. Sanchez." *Id.*, p. 876.

After being removed, Cuccia requested that the court consider his motion for reimbursement. [65] After some discussion between Cuccia, Ware, and the court, the matter was deferred to see what informal resolution could be accomplished at an Indigent Defender Board meeting scheduled for the next week. [66] Since the record is subsequently silent on the question of reimbursement of expenses for Cuccia and the Capital Defense Project, the court assumes that the matter was informally resolved with the parish Indigent Defender Board.

FOOTNOTES

65 *Id.*, p. 864. During the ensuing discussion, Cuccia identified the motion as one which was entitled "Motion To Provide Funds Owed," filed in January. *Id.*, p. 870.

66 *See generally, id.*, p. 864-876.

Counsel of Choice

In this direct appeal, Reeves argues that he was unconstitutionally denied counsel of his choice when the trial court removed Cuccia and the Capital Defense Project from representing him for the retrial and re-appointed Ware, the local Chief Public Defender. An identification of the nature of the representation of the [Pg **[**60]** 35] defendant provided by Cuccia and the Capital Defense Project attorneys is necessary in order to determine precisely the constitutional rights to which Reeves was entitled.

Federal Constitutional Rights

The Sixth Amendment to the Constitution provides that HN14 "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The Supreme Court has recognized the HN15 efficacy of having the assistance of counsel during the adversarial procedure of a criminal trial. *Wheat v. United States*, 486 U.S. 153, 158-159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988) ("...the Amendment "secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime."), *citing Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The assistance of counsel may be secured in various ways--the hiring of an attorney's services by the criminal defendant or by another on behalf of the defendant, the attorney's volunteering of services *pro bono publico*, or the court's appointment of private counsel or the public defender if the defendant is indigent.

HN16 Although "the essential aim of the Amendment is to guarantee an **[**61]** effective advocate for each criminal defendant...", the Sixth Amendment also encompasses "... the right to select and be represented by one's preferred attorney." *Wheat*, 486 U.S. at 159, 108 S.Ct. at 1697. A criminal defendant represented by an otherwise qualified attorney paid for by the defendant or paid for by someone on behalf of the defendant, or who has accepted the donation of an attorney's services, has the right to counsel of his choice. The Supreme Court has held that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to **[*1056]** represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, [Pg 36] 624-625, 109 S.Ct. 2646, 2652, 109 S. Ct. 2667, 105 L.Ed.2d 528 (1989).

However, "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." *Id.* The Supreme Court has stated unequivocally that a criminal defendant who has been appointed counsel has no right under the Sixth Amendment to the counsel of his choice:

HN17 The Amendment guarantees defendants in criminal cases the right to adequate representation, **[**62]** but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. "[A] defendant may not insist on representation by an attorney he cannot afford." *Wheat, supra,* at 159, 108 S.Ct. at 1697. *Caplin & Drysdale, Chartered v. United States,* 491 U.S. at 624, 109 S.Ct. at 2652. This distinction was again noted by the Supreme Court in *United States v. Gonzalez-Lopez,* 548 U.S. 140, 151, 126 S. Ct. 2557, 2565, 165 L. Ed. 2d 409 (2006), where the Court held "... the right to counsel of choice does not extend to defendants who require counsel to be appointed for them."

HN18 The Supreme Court has found structural error requiring reversal, and a violation of the Sixth Amendment, where a criminal defendant has been denied his right to retained counsel of choice, or where a criminal defendant has been denied the representation of counsel of choice willing to donate his services. *Gonzalez-Lopez,* 548 U.S. at 150, 126 S.Ct. at 2564. Where the right to be assisted by counsel of one's choice is wrongly denied, no harmless-error analysis which inquires into counsel's effectiveness, or prejudice to the defendant, **[**63]** is required: Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice--which is the right to a particular lawyer regardless of comparative effectiveness--with the right to effective counsel--which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed. *Gonzalez-Lopez,* 548 U.S. at 148, 126 S.Ct. at 2563.

[Pg 37] Thus, HN19 under the Federal Constitution, a criminal defendant who has hired his own counsel, or who has counsel retained on his behalf, has a right to both effective representation and to counsel of his choice. The same is true of a criminal defendant whose counsel has volunteered his services. A criminal defendant who has been appointed counsel, whether a private attorney or a public defender, only has the right under the federal constitution to effective representation.

State Constitutional Rights

The Louisiana Constitution ensures similar rights to the assistance of counsel for a criminal defendant as those arising under the federal constitution. Louisiana Const. art. 1, § 13 **[**64]** provides in relevant part: HN20 "At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." As the Supreme Court has distinguished between the extent of the federal constitutional right to counsel of choice between retained or volunteered, and appointed counsel, so too has this court distinguished between the right to counsel of **[*1057]** choice when dealing with appointed counsel, and counsel retained or volunteering his or her services:
HN21 As a general proposition a person accused in a criminal trial has the right to counsel of his choice. *State v. Leggett,* 363 So.2d 434 (La. 1978); *State v. Mackie,* 352 So.2d 1297 (La. 1977); *State v. Anthony,* 347 So.2d 483 (La. 1977). If a defendant is indigent he has the right to court appointed counsel. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin,* [407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)]; *State v. Adams,* 369 So.2d 1327 (La. 1979); *City of Baton Rouge v. Dees,* 363 So.2d 530 (La. 1978). An indigent defendant does not have the right to have a particular attorney appointed

[65]** to represent him. *State v. Rideau*, 278 So.2d 100 (La. 1973). An indigent's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice, if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice. *State v. Jones*, 376 So.2d 125 (La. 1979); *State v. Leggett, supra; State v. Mackie, supra.*
State v. Scott, 2004-1312 p. 8 (La. 1/19/06), 921 So.2d 904, *cert. denied*, 549 U.S. [Pg 38] 858, 127 S.Ct. 137, 166 L.Ed.2d 100 (2006), *overruled in part on other grounds, State v. Dunn*, 2007-0878 (La. 1/25/08), 974 So.2d 658; *citing State y Harper*, 381 So.2d 468, 470-471 (La. 1980).

Similar to the federal court, this court has determined that [HN22] the right to counsel of choice extends to a criminal defendant who has hired his own counsel. In addition, the right to counsel of choice extends to a defendant who has had an attorney hired for him by a collateral source. In *State v. Jones*, 1997-2593 (La. 3/4/98), 707 So.2d 975, the defendant's father retained an attorney to represent his son. This court held that both the federal and state **[**66]** constitutions precluded the removal of counsel obtained through a collateral source. *Id.*, 1997-2593 p. 3, 707 So.2d at 977.

The right to counsel of choice also extends under the state constitution to a criminal defendant for whom an attorney volunteers his legal services. *State v. Sims*, 2007-2216 p. 1 (La. 11/16/07), 968 So.2d 721, 722 ("The right to private, non-appointed counsel of choice does not distinguish between a paid attorney and a *pro bono* lawyer."), *citing Caplin & Drysdale*, 491 U.S. at 624-625. Although the written order accompanying the writ grant in *Sims* does not include the facts of the case, the court record shows that a question of the indigent status of the criminal defendant was raised immediately prior to trial. Although counsel from the public defender's office had initially been appointed to represent the defendant, immediately prior to trial, the trial judge determined the defendant did not satisfy the requirements for indigency and ordered the defendant to retain counsel. Instead, a supervising attorney at a local law school's clinical program agreed to volunteer her representation of the defendant *pro bono*. When the defendant appeared in court with volunteer **[**67]** counsel, the trial court removed volunteer counsel, ordered the defendant to hire a private, paid lawyer, and forbade the defendant from being represented by any attorney working *pro bono*. [Pg 39] The court of appeal denied a writ of review. This court issued a written order, granting the defendant's writ. This court ruled that the trial court erred in removing the defendant's volunteer counsel of choice, reversed the trial court's order removing volunteer counsel and reinstated volunteer counsel's representation **[*1058]** of the defendant. *Sims*, 2007-2216 p. 1, 968 So.2d at 722.

However, similar to the constitutional rights afforded under the federal constitution, under our state constitution, a criminal defendant is not entitled to choose his appointed private counsel or the appointed public defender.

Analysis

Reeves asserts on appeal that he was denied the right to counsel of his choice, that denial of this right is a structural error in his retrial, and that the re-appointment of Ware as his counsel for the retrial entitles Reeves to a reversal of his conviction and sentence, and a new trial. The defense asserts that Cuccia and da Ponte, through the Capital Defense Project, were willing to **[**68]** continue to represent Reeves at his retrial at no cost to the state. Considering the right to counsel of choice under federal

and state law extends only to retained or volunteered counsel, the defense does not specify whether Cuccia and da Ponte were somehow retained or whether they were donating their services.

By contrast, the state argues that the nature of Reeves' initial representation by Cuccia and da Ponte through the Capital Defense Project was that of appointed counsel. Thus, the state argues, under either the federal or state constitutions, Reeves does not have the right to appointed counsel of choice. The state contends that the financial realities of the indigent defense system, and the conditions Cuccia himself placed on the continuance of his group's representation, led to the removal of Cuccia and da Ponte. In their place, the state asserts the court, in its discretion, appointed [Pg 40] competent and qualified counsel in the person of Ware, the capital-certified local Chief Public Defender.

In order to fully comprehend the nature of the representation provided by Cuccia and da Ponte, it is necessary to understand certain aspects of the former structure of the indigent **[**69]** defense system in Louisiana, prior to the passage of the Louisiana Public Defender Act of 2007. HN23 Former La. R.S. 15:144 established an indigent defender board in each judicial district. [67] In order to provide counsel for indigent defendants in its judicial district, the Calcasieu Parish Indigent Defender Board selected the model of employing a chief indigent defender and such assistants and supporting personnel as the district board deemed necessary. [68] Additionally, the legislature authorized the district boards to enter into contracts with other attorneys to provide counsel for indigent defendants when necessary. [69]

FOOTNOTES

67 Former La. R.S. 15:144(A) provided in pertinent part: HN24 "An indigent defender board, hereinafter referred to as the district board, shall be established in each judicial district...".

68 Former La. R.S. 15:145(B)(2)(a) provided in pertinent part:

HN25 **§ 145. Powers and duties of the judicial district indigent defender boards**

B. Each district board shall select one of the following procedures or any combination thereof for providing counsel for indigent defendants:

* * *

(2)(a) The district board may employ a chief indigent defender and such assistants and supporting personnel as it **[**70]** deems necessary. ...

69 Former La. R.S. 15:145(B)(3) provided:

HN26 **§ 145. Powers and duties of the judicial district indigent defender boards**

B. Each district board shall select one of the following procedures or any combination thereof for providing counsel for indigent defendants:

* * *

(3) The district board may enter into a contract or contracts, on such terms and conditions as it deems advisable, with one or more attorneys licensed to practice law in this state to provide counsel for indigent defendants.

[*1059] Each district indigent defender board was authorized to accept, receive and use [Pg 41] public or private grants. [70] The primary source of funding for the district boards, however, was the indigent defender fund created within each judicial district, which the district boards administered, and which was additionally composed of funds obtained through legislatively-authorized fees and direct state contributions. [71]

FOOTNOTES

70 Former La. R.S. 15:145(F) provided: HN27 "The district board may accept, receive, and use public or private grants. Copies of applications for public or private grants shall be forwarded to the state board."

71 Former La. R.S. 15:146, as it existed at the time of Reeves' trial, provided **[**71]** in pertinent part:

HN28 **§ 146. Judicial district indigent defender fund**

A. There is hereby created within each judicial district an indigent defender fund which shall be administered by the district board and composed of funds provided for by this Section and such funds as may be appropriated or otherwise made available to it.

B. (1) Every court of original criminal jurisdiction ... shall remit the following special costs to the district indigent defender fund for the following violations, under state statute as well as under parish or municipal ordinance. The following costs shall be

assessed in cases in which a defendant is convicted after a trial, a plea of guilty or nolo contendere, or after forfeiting bond, and shall be in addition to all other fines, costs, or forfeitures imposed:

(a) Not less than the sum of seventeen dollars and fifty cents for each offense, except a parking violation. Upon recommendation of the district board and by a majority vote of the judges of the courts of original jurisdiction within the district, this sum may be increased to not more than thirty-five dollars. ...

* * *C. In addition to the funds provided for in Subsection B hereof the state shall pay to each district **[**72]** indigent defender board, on the warrant of its chairman, the sum of ten thousand dollars per annum.

D. The funds provided for in this Section and all interest or other income earned from the investment of such funds shall be used and administered by the district board.

Another former feature of the indigent defense system was the legislature's establishment of a state-wide entity, the Louisiana Indigent Defense Assistance Board in the office of the governor, known by its acronym "LIDAB." [72] The purpose of HN29 LIDAB was to provide supplemental funds, when appropriated by the legislature, to [Pg 42] district indigent defender boards to address specific criminal defense needs. [73] One of the specific criminal defense needs to be addressed by LIDAB was the adoption of rules for supplemental assistance for trial counsel in capital cases where the local indigent defender board was unable to provide counsel. [74] LIDAB was authorized **[*1060]** by the legislature to develop and maintain programs to implement the guidelines for this type of supplemental assistance. [75]

FOOTNOTES

72 Former La. R.S. 15:151(A) provided:

HN30 **§ 151. Indigent Defense Assistance Board**

A. There is hereby established in the office of the governor the Indigent **[**73]** Defense Assistance Board.

73 Former La. R.S. 15:151.2(A) provided:

HN31 **§ 151.2. Powers; duties; responsibilities; limitations**

A. The board may provide supplemental funds, when appropriated by the legislature for that purpose, to judicial district indigent defender boards only as authorized herein for the purposes of complying with the requirements of the Constitution of Louisiana and the Constitution of the United States of America and specific statutory provisions affording the right to counsel to indigent defendants in criminal cases.

74 Former La. R.S. 15:151.2(D) provided in pertinent part:

HN32 **§ 151.2. Powers; duties; responsibilities; limitations**

D. The board shall adopt rules for providing supplemental assistance to the judicial district indigent defender boards, which address the following:

* * *

(3) Guidelines for supplemental assistance that take into account the failure of the judicial district indigent defender board to provide local counsel in capital cases.

* * *

(6) Guidelines for supplemental assistance for compensation when the judicial district indigent defender board compensates a lawyer retained to handle a specific case or cases.

* * *

(8) Guidelines for supplemental assistance that **[**74]** take into account capital cases, appellate cases, expert witnesses, specialized testing and other clearly demonstrated needs.

* * *

(10) Guidelines for supplemental assistance in specific capital cases for judicial district indigent defender boards which are not otherwise qualified to receive supplemental assistance. ...

[75] Former La. R.S. 15:151.2(E)(1) provided: [HN33] "The board shall have authority by rule, to develop and maintain such programs as necessary to implement the guidelines for supplemental assistance."

The Capital Defense Project was a part of the regional capital defense program created and funded by LIDAB. As explained by defense counsel in its brief on appeal: "... Mr. Cuccia's initial involvement in the case was based through an independent capital trial office relying on staff attorneys created through Louisiana Indigent Defense Assistance Board's regional capital defense program, and not [Pg 43] through the selection by the district court." [76] The record contains a discussion which explains the relationship even more explicitly. During a hearing on several defense motions held on September 16, 2003, prior to the first trial, Judge Quienalty, the then-presiding judge, specifically **[**75]** questioned Cuccia as to whether he had been hired or appointed. Cuccia responded:

Cuccia: We are an indigent counsel. We are a private non-profit organization funded by the Louisiana Indigent Defender Assistance [B]oard to primarily provide representation to indigents when there is a conflict of interest between the regular Public Defender's Office and the defendant. In this particular case, I am here with a - and usually that's because there are two or more defendants - in this case, I am here with Jason Reeves because the Calcasieu Parish Public Defender's Office needed help and -

Court: So, they hired you?

Cuccia: They provided the funds for all of the investigations.

Court: Okay.

Cuccia: I have not - I personally have not received one penny. My program has not received -

Court: I'm just trying to figure out how you got into this.

Cuccia: I just want to make sure when you say hired.

Court: Okay.

Cuccia: We're over here representing an indigent. Calcasieu Parish Public Defender's Office has funded the defense of this case.

Court: Well, did some judge appoint you?

Cuccia: Certainly Judge Minaldi [who had previously presided over the case] accepted me - She did not -

Court: No, it's a very simple **[**76]** question. Did some judge appoint you or did you enroll at the request of our Indigent Board?

Cuccia: I volunteered at the request of the -

[Pg 44] Court: Okay.

[*1061] Cuccia: - Indigent Board with the approval of Judge Minaldi.

Court: Very well.

Cuccia: I don't know if she made a formal appointment or not. [77]

FOOTNOTES

[76] Appellant's Supplemental Brief and Response to State's Brief On Appeal, p. 11.

[77] Vol. 7, p. 1742-1744; *see also* 2nd Supp. p. 41-43. At the hearing on the motion to suppress identifications, held on April 17, 2002, then-presiding Judge Minaldi indicated she signed a motion to enroll Cuccia in the case, after ascertaining his awareness of the pending deadlines and motion hearings set in the case. Vol. 13, p. 3235.

Cuccia maintains, and the record reflects, that the local indigent defender board funded the investigation of the case as far as it was able. Cuccia agreed to the representation, on behalf of the Capital Defense Project, at the request of the local indigent defender board. Cuccia did not receive attorneys fees from the local indigent defender board; however, the Capital Defense Project was funded, for the time period at issue, in large part, if not wholly, by the state through LIDAB **[**77]** and the Governor's Office.

According to Ware, the Capital Defense Project began representing Reeves on March 28, 2002. The funding hearing at which Cuccia and da Ponte were removed was held on March 23, 2004. This court takes judicial notice that, for the three year time period from July 1, 2001 through June 30, 2004, which includes the two year time period of the Capital Defense Project's involvement in Reeves' case, the Capital Defense Project of Southeast Louisiana received contracts for legal services from the Governor's office through LIDAB in the amounts of $ 675,000 (for Fiscal Year 07/01/01-06/30/02) and $ 425,000 (for Fiscal Year 07/01/03-06/30/04), for a total of $ 1.1 million. La. C.E. 201; *see* 2001/2002 Office of the Governor, Division of Administration, Office of Contractual Review Ann. Rep., "Professional, Personal, Consulting, and Social Services Contracts-Top 50 Legal Contractors 07/01/01-6/30/02;" *and* 2003/2004 Office of the Governor, Division of Administration, Office [Pg 45] of Contractual Review Ann. Rep., "Professional, Personal, Consulting, and Social Services Contracts-Top 50 Legal Contractors 07/01/03-06/30/04." Post-2007 reform, the Capital Defense Project **[**78]** is now listed as a state-funded, regional capital conflict panel on the Louisiana Public Defender Board's website. Consequently, although not a part of the local Public Defender's Office, the Capital Defense Project, funded through LIDAB, was another arm of the indigent defense system funded by the state. [78]

FOOTNOTES

[78] This relationship is made clear during a discussion at the June 22, 2004 *ex pane* hearing, wherein it was stated that Cuccia was involved with the capital conflict panel funded by LIDAB. June 22, 2004 *Ex Pane* hearing transcript, p. 31, Box Labeled "All Documents Under Seal."

With these relationships in mind, the nature of Reeves' representation by Cuccia and da Ponte becomes clear. Reeves was initially determined to be indigent and the local public defender's office was appointed as his counsel. The local district indigent defender board contracted with the Capital Defense Project, as part of LIDAB's regional capital defense program, for capital trial assistance with this case. [79] Stated another way, the state-wide supplemental assistance aspect of the state indigent defense system assisted the local arm of the state indigent defense system, which had been appointed as counsel **[**79]** for Reeves. Consequently, we find that the representation by the Capital Defense Project **[*1062]** in this case was characteristic of appointed counsel.

FOOTNOTES

[79] As previously stated, HN34 pursuant to former La. R.S. 15:145(B)(3) the district board had the authority to enter into contracts with other attorneys in order to handle specific cases.

This case is distinguishable from cases where a criminal defendant retains counsel himself or finds a collateral source willing to shoulder his representation, either through payment or a donation of services. Although the original contract between the district Indigent Defender Board and the Capital Defense Project included an amount for attorneys' fees, those attorneys' fees, if paid, would have been paid by legislatively-approved fees or direct state financing by the local district [Pg 46] Indigent Defender Board. As it occurred, attorneys' fees were not paid through the contract, but the attorneys who represented Reeves were funded though a state-financed contract under a LIDAB program. Indeed, at the funding hearing, Ware explained the $ 50,000 figure for attorney fees in the original contract, as follows: "[t]hat would represent the actual attorney fees, that **[**80]** Mr. Cuccia and his staff would not enjoy personally but would go to his office as compensation for the time that they spent representing Jason." [80] Cuccia further explained that the additional $ 35,000 "was advanced out of the Capital Defense Project budget." [81]

FOOTNOTES

[80] 1st Supp. Vol. 4, p. 827.

[81] *Id.*, p. 830.

Although defense counsel on appeal sometimes characterizes the Capital Defense Project's representation as a *pro Bono* donation of services, trial defense counsel considered the nature of the representation to be that of appointed counsel. Cuccia told Judge Canaday:

... Although, I would point out that maybe this is -- maybe we're in this case in somewhat of an odd circumstance because we did, I guess, contract with the IDB to provide this representation.

But it was only with the approval of Judge Minaldi, and specific understanding -- so, **I always felt, that there was a -- to a great extent, a court appointment**.

I mean, a Court was -- we would not have been led -- Judge Minaldi wanted to pass on -- pass approval on it before we actually got in this case, and the arrangements that were made with the Public Defenders' Office. [82]

FOOTNOTES

82 *See* 1st Supp. Vol. 4, p. 873-874. As Cuccia told Judge Quienalty **[**81]** at the September 16, 2003 hearing, he was unsure if a formal appointment had been made. Under the previous indigent system, Cuccia agreed to undertake the representation at the request of the local indigent defender board with the approval of the then-presiding judge. Vol. 7, p. 1743.

Sanchez, representing Ware, was correct in stating that Cuccia was a private lawyer, or at least was an attorney outside of the local public defender's staff. [83] [Pg 47] However, Cuccia was a private lawyer who was working pursuant to a contract with the local Indigent Defender Board and who was otherwise funded by the state. Under the unique and exceptional circumstances of the interplay between the local and regional indigent defense system, the nature of Reeves' representation by Cuccia and da Ponte was characteristic of appointed counsel. As such, Reeves did not have a right to counsel of choice under either the federal or state constitutions, but only had the right to effective representation of counsel.

FOOTNOTES

83 *Id.*, p. 842.

Having made the determination that Reeves was not constitutionally entitled to counsel of his choice, we feel we must nevertheless address whether the trial judge's removal of Cuccia **[**82]** and the Capital Defense Project staff, and the re-appointment **[*1063]** of Ware as counsel for Reeves, was proper. This court has previously held that HN3[↑] the removal of counsel must be reviewed for an abuse of the trial court's great discretion. *See State v. Brown*, 2003-0897 p. 15 (La. 4/12/05),

907 So.2d 1, 14, *cert. denied*, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006).

We note, primarily, the difficulty of the problem facing the district court. Cuccia's motions indicated that expenses were still owed on the first trial, and more funding, for which no source was apparent, was immediately necessary for the retrial. Indeed, Cuccia himself qualified his continued representation of the defendant when he stated:

Your Honor, our position is that we stand ready to continue with the representation of Jason Reeves, **provided** that we can -- **that the funds that we need to present the proper defense for him can provide -- can be provided to us sufficiently in advance of trial** for us to prepare and present the type of defense that Jason Reeves is entitled to, **as well as, of course, we would like the reimbursement of the $ 35,000 which I -- which was advanced out of the Capital Defense Project budget. [**83]** [84]

Cuccia made clear in his representations to the court that he could not continue to [Pg 48] represent Reeves unless the financial circumstances changed and was requesting the district court's direction and intervention in resolving the matter. [85]

FOOTNOTES

[84] *Id.*, p. 830 (emphasis added).

[85] Ware later represented at a hearing held on September 17, 2004, "that Kerry Cuccia and Ms. Graham Da Ponte' again have told me just days ago that they're willing to resume the representation, should -- should the *Peart* motion be granted, or any other relief is granted. So I just want to make that a part of the record as well." The following colloquy ensued:

Court: I mean, what is that a part of?

Ware: A part of the *Peart* issue.

Court: I mean, are you saying without contingencies, without payment, without advancement of experts, everything that was elicited before is now changed, is that --

Ware: No, sir.

Court: -- what -- the purpose of that comment was?

Ware: No. The thing is, nothing has changed with respect to them willing to take on -- or resume the representation. They're willing to come in without cost or expenses or legal fees for themselves or for their office, with the -- but they do --

they're not going **[**84]** to finance the case as far as experts and other related expenses. But they're willing to resume the representation without costing the parish legal fees.

Court: As far as the statement, we'll let it be in the record, but I will refer back to the record of March of 2004 as to their position at the time that the counsel was reassigned and the reasons therefore and their position for the record at that time.

See Vol. 17, p. 4222-4224.

The record shows that all counsel participated with the district judge in discussions seeking a solution. [86] The record makes apparent that the district court's proposed solution of removing Cuccia and da Ponte and substituting Ware as appointed counsel was not a surprise to either then-current or proposed counsel. Indeed, Ware brought to the funding hearing separate counsel to represent him in his capacity as chief public defender of the district to argue against his expected substitution and re-appointment. After Judge Canaday issued his ruling, neither Cuccia nor da Ponte objected to the ruling on behalf of themselves or the Capital Defense Project. Objections were lodged by Cuccia on behalf of the defendant, [87] and by **[*1064]** Ware; [88] however, Ware's counsel made **[**85]** clear during argument that he would have [Pg 49] objected to any decision of the court which resulted in Ware's appointment. Indeed, counsel for Ware made clear he would have supported the appointment of anyone other than Ware. [89]

FOOTNOTES

86 Indeed, Ware acknowledged there was no "easy or ready solution" for the problem. *Id.*, p. 825.

87 *Id.*, p. 861.

88 *Id.*, p. 859.

89 Earlier in the argument, Sanchez, on behalf of Ware, addressed the court: "So we would ask the Court find another mechanism, appoint someone else or to delay this trial until funds or such appointment is available." *Id.*, p. 844.

Although *Citizen* gave district courts the authority to halt a prosecution until adequate funding was secured, *Citizen* had not yet been handed down at the time of this funding hearing. We take into consideration the fact that Reeves' initial trial had

fully concluded, and the retrial was to be re-set several months into the future in any event, due to the lack of immediately-available funding. This was not a situation where counsel was substituted on the eve of trial without sufficient time to fully prepare. The district court foresaw that reappointed counsel would have adequate time to prepare a defense, especially **[**86]** considering that the state's entire case, with a few evidentiary exceptions, was available *via* the transcripts of the first trial. [90]

FOOTNOTES

[90] In fact, the record shows that within two months of the hearing, the Capital Defense Project forwarded to Ware eleven boxes regarding the first Reeves trial and an outline of the contents of each box. Vol. 11, p. 2680. The boxes contained the entire guilt phase and proposed penalty phase of the first trial, all transcripts, all post-trial pleadings and the various pretrial writs which were filed. In addition, Cuccia and da Ponte supplied Ware with outlines of both the penalty phase and the guilt phase regarding "Witness Points." *See* letter dated May 18, 2004, stamped "Filed in Evidence" and dated 6/22/04 for the *ex parte* June 22, 2004 hearing, Box Labeled "All Documents Under Seal." Further, testimony at a September 15, 2004 motion hearing shows that Ware received copies of the state's opening, closing and rebuttal arguments, and portions of the voir dire of the first trial, as requested by the defense, prior to trial. Vol. 17, p. 4115-4119.

Moreover, the district court anticipated the appointment of qualified local counsel would facilitate prompt resolution **[**87]** of future funding, and other questions, that would arise in connection with the retrial. The record bears out this consideration. The district court, and everyone involved in these discussions, were well aware of the seemingly insoluble funding issues which plagued this judicial district at that time. Appointing local counsel allowed the district court to quickly set hearings for [Pg 50] questions that arose pretrial. [91] In a status conference held on May 21, 2004, the district court indicated that every week that criminal court was to be held, the court would hold a status hearing on the *Reeves* case to address any impediments in a timely fashion and to resolve them. [92] In a September 15, 2004 motion hearing, the court pledged to make himself available on a "short time basis" to make certain that all defense issues were dealt with and addressed pretrial. [93]

FOOTNOTES

[91] *See ex.* Vol. 15, p. 4152.

[92] Vol. 15, p. 3648.

[93] Vol. 15, p. 4154.

In arguing that the desire to appoint local counsel is not a sufficient factor to overcome an attorney-client relationship, defense counsel on appeal directs us to the case of *Grant v. State*, 278 Ga. 817, 607 S.E. 2d 586 (Ga. 2005), a Georgia death penalty prosecution. **[**88]** In *Grant*, the trial court tried to impose appointed co-counsel to assist already-appointed lead counsel and to forbid volunteer attorneys from working on the case. Relying on earlier state court jurisprudence, the Supreme Court of Georgia **[*1065]** held that the trial court failed to give proper weight to the significant relationship that existed between Grant and his lead appointed counsel and the volunteer attorneys who worked with him. *Grant*, 607 S.E.2d at 587.

We note, however, that the *Grant* case is easily distinguishable from the facts of this case. The counsel at issue in *Grant* were volunteering their services; thus, Grant had a federal constitutional right to counsel of his choice. Moreover, in this case we find that the desire to ensure the participation of local counsel was not the motivating factor behind Judge Canaday's ruling; rather, non-local defense counsel informed the court of their inability to proceed without a solution to the funding issue, seeking the court's intervention and direction.

We have held that counsel was appointed for Reeves. Consequently, Reeves [Pg 51] did not have the right, under either the federal or state constitutions, to counsel of his choice. We hold **[**89]** that the district court's actions, in removing Cuccia and da Ponte and reinstating the appointment of Ware as counsel for Reeves, did not result in structural error in Reeves' retrial. We further find that, considering the unique and exceptional circumstances presented here, the district court did not abuse its discretion in removing Cuccia and da Ponte from representing the defendant, upon being informed that they could no longer continue their representation under then-existing conditions. We additionally find no abuse of the district court's discretion in reinstating the original appointment of the local, capital-certified Chief Public Defender as counsel for Reeves for his retrial.

Attorney-Client Relationship

In connection with the defendant's claim of a right to counsel of choice, defense counsel argues on appeal that the existing close relationship between Reeves and the attorneys of the Capital Defense Project should have been maintained. This issue was briefly raised at the funding hearing, with Ware's counsel, and Ware himself, arguing that there was a constitutional dimension to preserving an existing attorney-client relationship. However, no specific constitutional argument **[**90]** was made, either at the hearing, or later in a supplemental filing to the district court, despite the district court's invitation to do so. [94] After a review of the jurisprudence, we find no constitutional authority to support this aspect of the defense's argument, either in the federal or state constitutions.

FOOTNOTES

[94] In its "Motion to Reconsider Order of March 23, 2004 Substituting Counsel," filed April 13, 2004, the defense argued generally that Reeves' "...substantive right to

the effective assistance of counsel, including the continuity of counsel because of the particular circumstances of this case, guaranteed to him by the 6th, 8th, and 14th Amendments to the U.S. Constitution and Article 1, Sections 2, 3, 13, 16, and 20 of the Louisiana State Constitution, has been violated because of the Court's unsolicited substitution of counsel." Vol. 11, p. 2651. The motion was denied by Judge Canaday. Vol. 11, p. 2652.

HN36 The Supreme Court has rejected any claim that the Sixth Amendment [Pg 52] guarantees a "meaningful attorney-client relationship" between an accused and his counsel. *See Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983). The fact situation in *Morris* concerned **[**91]** an indigent defendant who was appointed an attorney from the public defender's office. Appointed counsel represented the defendant at preliminary hearings and supervised an extensive investigation into the case. However, shortly prior to trial, appointed counsel was hospitalized for emergency surgery and the public defender assigned a senior trial attorney in that office to take over **[*1066]** the defendant's representation. The defendant objected at trial to his newly-appointed counsel, arguing that substitute counsel could not be as prepared as his original counsel, and refusing to aid substitute counsel in his defense. The defendant was convicted and subsequently sought federal habeas relief. Although the *pro se* federal habeas petition couched the alleged errors in other terms, the federal appellate court granted habeas relief, finding the Sixth Amendment guarantees a right to counsel with whom the accused has a "meaningful attorney-client relationship." Further, the federal appellate court found that the trial court abused its discretion and violated this right by denying a motion for continuance based on the substitution of appointed counsel shortly before trial. In reversing the federal **[**92]** appeals court ruling, the Supreme Court stated:

The Court of Appeals' HN37 conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a *meaningful attorney-client relationship*, [citation omitted] (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. [95]

FOOTNOTES

95 *Id.*, 461 U.S. at 13, 103 S.Ct. at 1617.

Similarly, HN38 we have found nothing in our state constitution, or in our review of state jurisprudence, which shows that a criminal defendant has a right to a particular attorney-client relationship separate from the right to counsel of choice. In *Scott, [Pg 53] supra*, the defendant argued, as here, that the removal of his appointed counsel approximately one month prior to trial unconstitutionally interfered with the attorney-client relationship and violated his right to counsel of choice. [96] In *Scott*, a conflict developed between Scott's lead appointed counsel and second-chair appointed counsel. The district court granted lead counsel's motion and appointed

new second-chair counsel over the defendant's objection. After reviewing the **[**93]** consistent jurisprudence holding that an indigent defendant does not have the right to choose his appointed counsel, and that lead appointed counsel had provided constitutionally-effective assistance to Scott, this court found "no interference with the attorney-client relationship and no violation of defendant's right to counsel of choice." [97] Here, we similarly find that Reeves did not have a right to choose his appointed counsel. Moreover, there is nothing in our state constitution which supports the defense's argument that a criminal defendant has a right to a particular attorney-client relationship. [98]

FOOTNOTES

[96] *Scott*, 2004-1312 p. 7, 921 So.2d at 916.

[97] *Scott*, 2004-1312 p. 14-15, 921 So.2d at 920-921.

[98] Although in *State v. Hattaway*, 621 So.2d 796 (La. 1993); *overruled in part on other grounds, State v. Carter*, 1994-2859 (La. 11/27/95), 664 So.2d 367, this court spoke of "constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship," the court was not referring to the preservation of a particular attorney-client relationship. Instead, the court was referring to the fact that an attorney-client relationship existed at a particular point in those criminal **[**94]** proceedings, and of the rights and prohibitions flowing from the existence of that relationship with regard to the state's attempts to communicate with a criminal defendant. *Hattaway*, 621 So.2d at 807.

Consequently, there is nothing in either the federal or state constitutions which would provide Reeves with the right to maintain a particular attorney-client relationship in the absence of a right to counsel of choice.

[*1067] *Right to Auxiliary Services*

In a related argument, defense counsel contends that Reeves was entitled to retain counsel of choice while securing auxiliary services from the state, citing to [Pg 54] *State v. Jones*, 1997-2593 (La. 3/4/98), 707 So.2d 975. Defense counsel's primary contention in this regard is that the district court's action, in removing Cuccia and da Ponte as counsel, and re-appointing and substituting Ware in response to Cuccia's motions for reimbursement and future funding, was neither requested nor warranted, and that less drastic options were available.

As stated previously, in *Jones*, the defendant's father retained counsel for his son. Although the criminal defendant did not retain counsel himself, counsel was provided to him by a collateral source; counsel **[**95]** was not appointed. *Jones* held that HN39 a defendant provided private counsel, through a collateral source, has a constitutional right to counsel of choice. In addition, the case stands for the

proposition that retention of private counsel from a collateral source, at no cost to the defendant, does not remove the defendant's right to a fair trial. Thus, notwithstanding the fact that the criminal defendant has no need for appointed counsel, the defendant may still be entitled to state funding for auxiliary services, such as experts: *Jones*, 1997-2593 p. 4, 707 So.2d at 977. We find no violation of the precepts set forth in *Jones* in our review of the record of this case.

Reeves' entitlement to funding for experts was never in doubt. Reeves was declared indigent and the public defender's office was appointed to represent him. Thereafter, the public defender's office, through the district indigent defender board, contracted with a capital trial program in connection with LIDAB for Reeves' initial trial counsel. For his retrial, Reeves was represented by the local Public Defender's Office. Thus, there is no question that Reeves was entitled to state funding for expert assistance.

Moreover, the record **[**96]** confirms that expert assistance was afforded to him at both his first and second trials. Several motions for funding were considered in *ex [Pg 55] paret* hearings and granted prior to Reeves' second trial. [99] Some of those motions involved reimbursement of experts who testified in the first trial. [100] In some cases, the expert witnesses were to be used in both trials and Judge Canaday found "[the outstanding balances were] interfering, not only with communications possibly with regard to using those experts again at a second trial, but also with Mr. Cuccia and Ms. Da Ponte, as well as any other use of those experts in Louisiana defense cases." Judge Canady noted "... that many of the tests, many of the interviews, many of the expenses, will not have to be duplicated, but that there will be some additional refreshings, some reviewing of the materials, and also the appearance at [re]trial itself." [101] Ware expressed **[*1068]** his "complete agreement with those comments." [102] The record clearly shows that Reeves was provided with expert assistance in defending himself against the charge of first degree murder and that Reeves' right to expert assistance has never been denied.

FOOTNOTES

[99] *See* two Ex Parte Orders **[**97]** signed July 19, 2004 based on Ex Parte Motion for Funds for Expert Witnesses, Box Labeled "All Documents Under Seal;" Ex Parte Motion and Order for Expert Assistance, filed September 3, 2004, motions for fingerprint expert, forensic entomologist, DNA consultant and traffic engineer granted, Box Labeled "All Documents Under Seal;" Ex Parte Motion and Order for Expert Assistance (To Be Filed Under Seal), filed September 17, 2004 motion for jury consultant granted, Box Labeled "All Documents Under Seal."

[100] *See* Ex Parte Order signed August 4, 2004, Box Labeled "All Documents Under Seal."

[101] Third Funding and In-Camera Proceeding Held *Ex Pane*, dated August 6, 2004, p. 17, Box Labeled "All Documents Under Seal."

[102] *Id.*

Further, we find the district court did not inject himself arbitrarily into this funding morass. This complicated and confusing situation was brought to the court's attention through defense trial counsel's motions for reimbursement and for future expenses; trial counsel properly solicited the court's aid in resolving these issues. Although defense counsel on appeal suggests the district court should have halted the prosecution going forward until adequate funds were available, **[**98]** as authorized by this [Pg 56] court in *Citizen*, we note that *Citizen* had not yet been handed down at the time of this funding hearing. Even so, the record shows the district court was assured by Ware that additional funding was not available and would not be available in any foreseeable future.

The defense argued in brief, and at oral argument in this court, that the removal of Cuccia and da Ponte did not actually save the state money, since the state had to pay for St. Dizier's appointment. [103] However, the subject of the funding of St. Dizier's appointment was not raised in the district court by the defense. In fact, Ware testified at an *ex pane* status conference held June 22, 2004, that the IDB had sufficient funds through its Capital Defense Fund to pay St. Dizier's fee "into the next several months." [104] At a subsequent hearing, Ware explained that the Capital Defense Fund "replenishes itself each month with the monthly receipts of court cost revenue." [105] The court noted that "... the Capital Defense Fund is an ongoing account for which deposits are made on a monthly basis ... ." [106] For reasons not apparent from the record, Ware had not thought sufficient funds would have been available **[**99]** for the reimbursement of Cuccia. [107]

FOOTNOTES

[103] We note, however, that the state did not have to pay travel expenses for St. Dizier, except to select a jury in a different jurisdiction, as he was local counsel.

[104] June 22, 2004 *Ex Pane* hearing transcript, p. 25, Box Labeled "All Documents Under Seal."

[105] September 15, 2004 *Ex Parte* Hearing, p. 13, Box Labeled "All Documents Under Seal."

[106] September 17, 2004 *Ex Parte* hearing, p. 6-7, Box Labeled "All Documents Under Seal."

[107] In the absence of a reason apparent on the record, we will not speculate as to the budgetary or other concerns facing the Indigent Defender Board and Ware.

We note the district court fully discussed his proposed action with all counsel prior to

the hearing in an attempt to reach a proper solution. There were many competing interests for the district court to consider. Paramount, of course, were the [Pg 57] defendant's rights to a fair trial and effective counsel. The public defender's office had no solution to offer the district court, other than to suggest that someone else be appointed or that the trial be halted. Without doubt, Cuccia and da Ponte were owed reimbursement of their expenses. Future funding was, considering **[**100]** the lack of resources for indigent defense, necessarily, going to be an issue for the district court to address in an on-going manner, and ease of scheduling hearings to deal with the anticipated funding motions **[*1069]** was an additional factor which the district court took into consideration. In addition, the district court also had to consider the rights of the victim's family in having this case prosecuted in a timely fashion, as well as the time limitations imposed by the Code of Criminal Procedure for bringing indicted defendants to trial. [108]

FOOTNOTES

[108] HN40 A capital case is instituted by indictment by a grand jury. La. C.Cr.P. art. 382(A). La. C.Cr.P. art. 578 provides that no trial shall be commenced in a capital case after three years from the date of institution of prosecution. In addition, both the state and a defendant have the right to a speedy trial. La. Const. art. 1, § 16, La. C.Cr.P. art. 701.

Moreover, *Citizen* does not stand for the proposition that ordering a halt to a trial is the only authorized remedy for a district court when adequate funds are not available to provide for an indigent defendant's constitutionally-protected right to counsel. Indeed, *Citizen* authorizes courts to "take **[**101]** other measures consistent with this opinion which protect the constitutional or statutory rights of the defendants." *Id.*, 2004-1841 p. 17, 898 So.2d at 339.

Reeves was constitutionally entitled to effective counsel and a fair trial. In the circumstances presented here, we find that the solution fashioned by the district court accomplished both constitutional requirements. Reeves was appointed able and effective lead counsel in the person of the local, capital-certified, chief public defender, and able and effective associate counsel in the person of an experienced local attorney. Moreover, a third attorney who worked with the Public Defender's [Pg 58] Office, was also enrolled as counsel for Reeves and participated in Reeves' retrial. Adequate funding was subsequently found to enable Reeves to present his defense at his retrial with expert assistance. Although the district court could have chosen a different solution from the universe of possible alternatives, we hold the measures taken by the district court here adequately protected the defendant's constitutional rights to effective appointed counsel and a fair trial.

Denial of Peart Motion

The defense contends the district court erred **[**102]** in re-appointing Ware at the March 23, 2004 funding hearing over his oral *Pears* objection, and in denying Ware's subsequent written *Pears* motions, based on his heavy caseload. Reeves argues he received constitutionally ineffective assistance of counsel due to Ware's heavy work

load.

Facts Relevant To Pears Issue

Although the focus of the March 23, 2004 hearing was primarily the funding issue raised by defense counsel, part of the argument raised by separate counsel for Ware in support of the position that Ware should not be re-appointed to this case was that Ware's heavy caseload and administrative responsibilities would prevent him from rendering constitutionally-effective assistance of counsel. In support of this *Pears* argument, Ware's attorney, Walt Sanchez, proposed a stipulation as to Ware's personal pending caseload, the number of cases in which Ware would participate with other attorneys who had primary responsibility, and the administrative and supervisory duties for which Ware was responsible as Chief Public Defender. Sanchez also referred to the Rules of Professional Conduct and an ethics opinion.

At the hearing, Sanchez acknowledged that, "...given the timing of this issue, [Pg **[**103]** 59] [the *Peart* issue] isn't full blown in front of the Court at this point." [109] After Judge Canaday ruled and substituted counsel, Sanchez specifically asked the judge if he would formally rule on the *Peart* issue **[*1070]** which had been raised. The judge stated that he did not believe any comment was required on the *Peart* issue, based on what had been presented, and later clarified that a reconsideration of that view would only be based on "something much more substantial in black letter law." [110] At a subsequent hearing held September 15, 2004, Ware admitted that the March 23, 2004 hearing "was not a *Peart* issue, it was a substitution of counsel issue, so there were some references made to the *Peart* case and things of that sort, but it wasn't fully developed." [111]

FOOTNOTES

109 1st Supp. Vol. 4, p. 851.

110 *Id.*, p. 876.

111 Vol. 17, p. 4190.

Defense counsel raised the *Peart* issue in subsequent motions, hearings, and status conferences. On April 13, 2004, Ware filed a motion seeking the court's reconsideration of its March 23, 2004 order substituting counsel. [112] In addition to asking the court to reconsider its removal of Cuccia, da Ponte and Taylor as trial counsel, Ware also requested reconsideration of **[**104]** the portion of the court's ruling which re-appointed him as counsel, suggesting "... that current counsel will be unable to provide reasonably effective representation because of undersigned counsel's obligations to numerous other clients and his administrative duties as Executive Director of the Public Defenders' Office." [113] The district court denied the defendant's motion. [114]

FOOTNOTES

[112] Vol. 11, p. 2650-2651.

[113] Vol. 11, p. 2651.

[114] Vol. 11, p. 2652.

[Pg 60] Subsequently, a status conference was held on May 21, 2004. [115] At that time, Ware informed the court of his upcoming schedule as part of his continuing objection to his appointment as lead counsel to the case. [116] The district court noted that Ware made these same arguments and objections at the time of his re-appointment. The court also noted that the defense had failed to take a writ on Ware's re-appointment, and stated its belief that the defense had evidently made the strategic decision to reserve that issue for appeal. Ware did not dispute this belief. [117]

FOOTNOTES

[115] *See* Vol. 15, p. 3629-3658.

[116] Vol. 15, p. 3642, 3649-3650.

[117] Vol. 15, p. 3651-3652.

Another status conference was held on June 18, 2004. [118] Ware discussed with the court that **[**105]** the defense would be filing a motion to enroll an additional attorney from the public defender's office to assist with the defense of the case. [119] On June 23, 2004, a written motion to enroll Richard White, a staff attorney with the Calcasieu Parish Public Defenders' Office, was granted. [120]

FOOTNOTES

[118] *See* Vol. 15, p. 3660-3706.

[119] Vol. 15, p. 3666.

[120] Vol. 11, p. 2711; Vol. 15, p. 3710.

Also on June 23, 2004, the defense filed a written *Peart* motion, asserting that Ware "has primary trial responsibility for 35 felony cases (including 1 capital rape, 5 second degree murder cases, and 10 aggravated rape cases). He is also playing a significant role in many other felony cases, that are being handled to some extent by other PDO attorneys." [121] The defense also sought to enroll separate counsel, Christine Lehmann, for the purpose of arguing the *Peart* motion. [122]

FOOTNOTES

[121] *See* "Peart Motion To Preclude The State From Forcing The Public Defender To Behave Unethically Towards Its Clients," Vol. 11, p. 2701-2705.

[122] Vol. 11, p. 2694-2699. This was not the first time that an attorney not of record attempted to file a *Peart* motion on behalf of Ware. The record shows that an even earlier *Peart* motion had been **[**106]** filed into the record by attorney Clive Stafford Smith when Ware was first appointed to represent Reeves. On April 17, 2002, the court denied this *Peart* motion in oral reasons, "... inasmuch as Mr. Smith is not the attorney of record and has no standing to file motions in this case." Vol. 13, p. 3160-3161.

[*1071] [Pg 61] The district court denied the motion to enroll Lehmann as separate counsel for the *Peart* hearing, and declined to hear the *Peart* motion itself: The Court would take notice at this time that nothing was stated in the body of this motion that was not argued or presented in court previously when new counsel was to be appointed. At that time the defendant was independently represented by Mr. Kerry Cuccia and Graham Deponte [sic]. In addition, Mr. Ron Ware and the Public Defenders' Office was independently represented by Mr. Walt Sanchez. The record speaks for itself as to the information that was presented to the Court prior to Mr. Ware and Mr. St. Dizier being appointed as counsel. It talked about caseload, it talked about a number of factors in which the Court made rulings and findings of which the Court would rely on the record at this time. Writs were not taken with regard to **[**107]** the Court's decision. The Court finds that this Motion to Enroll and the request for *Peart* information to be duplicative and moot based on the prior proceedings and determination of this Court and I will decline the appointment and I will also decline to fix a *Peart* proceeding in this matter. [123]

FOOTNOTES

[123] Vol. 12, p. 2805, 2812; Vol. 15, p. 3723-3724.

Upon Ware's request for clarification regarding the judge's refusal to fix the *Peart* motion for hearing, the judge stated:
Correct, until something can be demonstrated to the court in writing that would be distinguishable from what was presented at the time of appointment, I believe that was in April [sic; March] of 2004, that was distinguishable and for good cause why it was not presented there's no reason for the Court to rehash the same matters that have been discussed. [124]

FOOTNOTES

124 Vol. 15, p. 3724.

Ware then explained that he was re-urging his *Peart* objection because, as he became more familiar with the case, he felt it was even more apparent that he could not be effective. [125] The judge stated he understood, but rejected, Ware's position, indicating anything that Ware was now saying had been said previously:
I see no reason to go back unless some **[**108]** new information has been obtained and that new information can be specifically given to the Court [Pg 62] to review -- reopening an issue that you're concerned about and that there's good cause for not having that information previously. Those are the standards in order to review something that the Court feels has already been reviewed. [126]
In addition to the comments made by the court as to the merits of the *Peart* motion, the court noted the motion to enroll and the *Peart* motion were denied as having been submitted under Ms. Lehmann's signature, who was not counsel of record, but were to be made part of the proceedings as a proffer. [127]

FOOTNOTES

125 Vol. 15, p. 3727.

126 Vol. 15, p. 3727-3728.

127 Vol. 15, p. 3734. Ware signed both the motion to enroll as himself, and on behalf of Ms. Lehmann. Ware also signed the *Peart* motion on behalf of Ms. Lehmann.

[*1072] On June 29, 2004, the defense filed a notice of its intent to seek a writ from the district court's refusal to hear the *Peart* motion and a writ application was subsequently filed in the court of appeal. [128] The court of appeal, in a 2-1 ruling, denied the defense's writ, stating:
There is no error in the trial court's ruling which denied the motion **[**109]** to enroll additional counsel for the limited purpose of litigating a *Peart* motion. Based thereon, we additionally find that the trial court did not err in refusing to allow the *Peart* motion to be filed because it was not signed by enrolled counsel. [129]

FOOTNOTES

128 Vol. 11, p. 2714, 2722.

129 Vol. 11, p. 2735. The dissenting judge would have allowed the enrollment of counsel for the purpose of filing and litigating the *Peart* motion. *Id.*

On September 3, 2004, the defense tried again, and filed another *Peart* motion. [130] The allegations in this motion added the information that "...despite his diligent efforts, [Ware] continues to be unable, due to his other caseload and his administrative duties, to provide fully competent and adequate representation to Mr. Reeves." The motion alleged generally that "[Ware's] personal caseload continues [Pg 63] to be of a volume that is out of compliance with LIDAB and ABA standards for competent capital representation." Included as an exhibit was a "Declaration of Jason Reeves," requesting that Cuccia and da Ponte be placed back on the case. [131]

FOOTNOTES

130 Vol. 12, p. 2776-2785. The motion was entitled "Peart Motion To Preclude The State From Forcing The Public Defender To **[**110]** Behave Unethically Towards Its Clients; To Permit Enrollment of Independent Counsel For Litigating The Peart Motion; And To Reinstate Previous Trial Counsel As Appointed Counsel For Mr. Reeves."

131 Vol. 12, p. 2786.

The state opposed the defense's *Peart* motion as being repetitive, pointing out that the new *Peart* motion was nearly identical to several previous motions filed by the defendant and ruled upon by both the district court and the court of appeal. The sole "new" issue presented in the latest motion urged the court to reinstate Reeves' former counsel for the retrial, a little over a month before Reeves' second trial was to begin, and over seven months since Ware was assigned to the case. The state urged that this latest filing was clearly a dilatory tactic, as all issues had thoroughly been fleshed out and discussed in previous motions. Further, the state noted that the defense had never sought further review from the Louisiana Supreme Court. [132]

FOOTNOTES

132 Vol. 12, p. 2798-2816.

At a hearing on the defense's second written *Peart* motion, held September 15, 2004, the district judge stated his appreciation of the history of the defense's *Peart* allegations, beginning with the March 23, 2004 **[**111]** hearing:
In that March of 2004 proceeding the Court I believe accepted Mr. Walt Sanchez, who appeared and made an appearance as counsel for Mr. Ron Ware. It's also noticed that Mr. Cuccia and Ms. DaPonte were present and were independent counsel for Mr. Reeves during those proceedings. In addition, the defendant was present; and, in addition, the State was present. And the Court received substantial information and argument with regard to Mr. Ware's caseload, his administrative duties, his supervisory duties, everything that is contained within the concerns espoused in the *Peart* motion. [133]

[*1073] Judge Canaday noted that a formal, written *Peart* motion was submitted by the defense in June of 2004, but that he denied the motion itself based on the fact that the motion was not submitted by an attorney of record in the case. The judge noted that [Pg 64] writs were taken from this ruling, and denied by the court of appeal. [134] Judge Canaday continued, as follows:
... on September of 2004 now the defendant has as lead counsel resubmits [sic] under his signature the same proceedings disposed of in the June 2004 and March 2004 proceedings. As stated before, the Court has taken the concerns of counsel **[**112]** into consideration, specifically initially at the March of 2004 reassignment proceedings and determined that the unique position of Mr. Ware would only be self-limiting. It was noted at that time Mr. Ware did not have any division assignments. He is the only capital certified public defender within Calcasieu Parish Public Defenders' office as lead counsel. He has handled other capital matters, and the other capital matters that were pending within Calcasieu Parish have been staggered to allow preparation within time constraints to Mr. Ware. Further, he has been able to pick and choose the cases he wishes to become personally involved in. It is noted that there are other felony public defenders who are assigned to specific divisions that have primary responsibility for those cases, and Mr. Ware makes those decisions on his own as to whether he wants to be involved, should appear, and supervise. The Court also notes the years of experience he has had in administrating and oversight of the Calcasieu Parish Public Defenders' Office. Further and even additionally important is the previous representation of other felony charges to this specific defendant, Mr. Jason Reeves, and the rapport **[**113]** and relationship that is noted by the Court in the February of 2004 trial.

Now, in totality and in looking at the standards as indicated of the facts specific, the Court would have to make this comment, that in the past six months since the re-appointment the Defense team, which are three capable attorneys at this point, have effectively represented the defendant through all new areas. Motions have been filed, there's been aggressive cross-examinations, and there's been significant trial preparation both open and adversarially as well as ex parte with relations to the Court of which the record will speak for itself. The Court is clearly satisfied that there has been effective representation up to this point exceeding all *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 standards. I would like to note just for your concern that in this day and age it seems to be that there must be many motions and actions that are taken in order to defend all of those charged with crimes, but it is also necessary that individuals file certain motions to protect those that are even appointed to represent those defendants, and the Court acknowledges that and understands the need for those motions to be filed, Mr. **[**114]** Ware.

The Court will at this time as to the application of the *Peart* proceeding is going to deny the -- will allow you to file the motion, but will deny the fixing of the motion. It is being denied as repetitious. It [Pg 65] is also noted as res judicata and the law of the case doctrine. Nothing has changed; and, in fact, the actions of Defense counsel in the interim while these arguments and positions **[*1074]** have been presented have demonstrated just the opposite [sic; ","] of thoroughly effective preparation. Any specifics, statistical data, that you feel the Court has not had or received will be allowed to be proffered into the record. That may be submitted since the motion is part of the record and is being denied at this time for the reasons stated. ... [135]

FOOTNOTES

133 Vol. 17, p. 4172-4173.

134 Vol. 17, p. 4174.

135 Vol. 17, p. 4174-4176.

On September 24, 2004, the defense made a proffer into the record of its evidence in support of its *Peart* motion. [136] Three staff attorneys with the public defenders' office testified as to Ware's inability to provide training, assistance and supervision due to his heavy caseload. Ware described the administrative demands of his position, including staffing concerns **[**115]** that arose in his office during the time period of his re-appointment to Reeves' case. Ware testified that his caseload prevented him from providing competent representation to Reeves and the rest of his clients. Ware concluded by stating he did not think he was competent under the standards for constitutionally effective representation announced in *Strickland*.

FOOTNOTES

136 *See generally* Vol. 18, p. 4265-4346.

In addition to this testimony, the defense proffered several exhibits into the record, including a list of Ware's cases; a listing of the mandatory life cases pending in the public defenders' office; the *curriculum vitae* of Dane Ciolino, the defense's expert; the ABA 10 Principles of a Public Delivery System; an ethics opinion of the American Council of Chief Defenders; and a case from a federal appellate court.

The defense took a writ to the court of appeal from the court's September 15, 2004 ruling. The court of appeal subsequently denied the writ, and a requested stay of the trial, finding the following:
There is no error in the trial court's ruling denying Defendant's September 2 [sic; September 3], 2004 *Peart* motion. This issue was previously raised by the Defendant, and was denied on **[**116]** March 23, 2004. The Defendant did not seek review of the trial court's ruling.

[Pg 66] Further, the Defendant failed to demonstrate a significant change in circumstances, between March 23, 2004 and September 2, 2004, warranting either a hearing on his repetitive motion or the grant of relief, which was previously denied.

Additionally, the Defendant failed to submit proof regarding all of the factors enumerated in *State v. Peart*, 92-907 (La. 7/2/93), 621 So.2d 780, which are necessary before application of a rebuttable presumption of ineffectiveness to the Public Defender's Office.

For these reasons, the Defendant's writ application is denied. [137]

FOOTNOTES

137 Vol. 12, p. 2936.

Analysis

This court has previously held that [HN41] "[a] claim of ineffectiveness is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal." *State v. Miller*, 1999-0192 p. 25 (La. 9/6/00), 776 So.2d 396, 411, *cert. denied*, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). While it is generally true that ineffectiveness claims are considered on post-conviction, *Peart* held that a claim of ineffectiveness may be raised pretrial, based on counsel's ability to provide constitutionally **[**117]** effective counsel due to resources available and caseload concerns. In this case, the *Peart* motions raised pretrial dealt with the pretrial circumstances alleged, and the district court made its ruling based on those circumstances. **[*1075]** Therefore, our analysis will evaluate the district court's pretrial ruling only. Although defense counsel on appeal has raised allegations of ineffective assistance of counsel occurring at trial, [138] those matters are relegated to post-conviction, where an evidentiary hearing may be conducted, if necessary, to determine the merits of the defendant's allegations.

FOOTNOTES

138 *See* Appellant's Supplemental Brief and Response to the State's Brief on Appeal, p. 12.

[HN42] In evaluating Ware's ineffective assistance claim, the district court was required to undertake a detailed examination of the specific facts and circumstances of the case. This detailed examination is necessary because there is no precise [Pg 67] definition of reasonably effective assistance of counsel, which cannot be defined in a vacuum. Thus, of necessity, each ineffective assistance claim demands an individual, fact-specific inquiry. *See Peart*, 621 So.2d at 788. As stated in *Peart*,

> ...the true inquiry [for the **[**118]** district court] is whether an *individual* defendant has been provided with reasonably effective assistance, and no general finding by the trial court regarding a given lawyer's handling of other cases, or workload generally, can answer that very specific question as to an individual defendant and the defense being furnished him. *Id.*, 621 So.2d at 788 (emphasis in original).

In reviewing a district court's decision on a claim of ineffective assistance, "we take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients." *Peart*, 621 So.2d at 789.

Procedurally, when the *Peart* allegations were originally raised orally, the district court determined that the defense had not made a sufficient showing for the court to make a ruling. Subsequently, the first written *Peart* motion was refused as not being signed by counsel of record. The second written *Peart* motion was denied as failing to

present new or different information from the allegations already determined to be insufficient. The court of appeal, when **[**119]** applied to for a writ of review, found no error in these findings.

After reviewing the record and argument of counsel, we find that Ware did not provide sufficient evidence to show that his caseload was so burdensome, and the resources available to him were so limited, as to result in the delivery of constitutionally ineffective assistance of counsel. The record shows that Ware admitted that the defense's own expert indicated that Ware's caseload would not violate ABA guidelines. [139] Nor would Ware's caseload exceed the standards [Pg 68] enunciated in the ethics opinion on which the defense relied. [140] On cross-examination, Ware admitted that he makes the decision as to those cases with which he will be involved. [141] Moreover, Ware also admitted that one of the other capital cases with which he was involved had six attorneys working on the defense. [142]

FOOTNOTES

[139] Vol. 18, p. 4308; Defense Proffer D-C, "Affidavit of Dane Ciolino," p. 5.

[140] Vol. 18, p. 4313.

[141] Vol. 18, p. 4321.

[142] Vol. 18, p. 4320.

The state pointed out mistakes in the listing of Ware's caseload, including cases not going to trial when Ware had them listed, cases listed as priority cases which were not priorities, cases listed as **[**120]** ready **[*1076]** for trial which were not in a posture to be tried, cases in which the defendant was not competent so could not be tried, and cases where the defendants were charged with crimes less serious than those indicated on Ware's list. The state further showed that one of the staff attorneys, whom Ware indicated needed his assistance in defending cases, had been practicing law for ten years. [143] Finally, the state revealed that Judge Canaday offered to appoint different counsel to relieve Ware's caseload burden in three other specific cases, but Ware declined. [144]

FOOTNOTES

[143] Vol. 18, p. 4326-4329.

[144] Vol. 18, p. 4332; State Proffer 1, excerpt of "Status Conference" held August 4, 2004, p. 2-3.

By Ware's own admission, he could select those cases, other than capital cases, for which he would represent the indigent defendants or for which he would render assistance to staff attorneys within his office. [145] Ware did not have a specific division

of court for which he was responsible. Ware's caseload did not exceed ABA guidelines Or the guidelines expressed in the ethics opinion proffered in evidence in [Pg 69] support of his contention. Ware was assisted by two other attorneys in this matter. He was **[**121]** provided with transcripts of the first trial, attorney notes on evidence and strategy by Reeves' counsel in the first trial, and access to those attorneys should questions arise. Reeves was provided with funding for each expert witness for which the defense requested financial assistance, including scientific witnesses and a jury consultant. [145]

FOOTNOTES

145 At the September 24, 2004 motion hearing, the court asked Ware if this type of *Peart* motion was pending in all of his first degree murder cases; Ware responded that it was not. Vol. 18, p. 4262.

146 Although the district court did not authorize specific funding for a jury consultant, the district court approved a certain amount of discretionary funding which the defense could use as they saw fit. Sealed *Ex Parte* Status Conference, dated September 3, 2004, p. 37-43, Box labeled "All Documents Under Seal."

By contrast, the evidence submitted in *Peart* was much more detailed and showed, beyond doubt, the burdensome nature of the attorney's caseload and the complete lack of resources available to him in his attempt to represent his indigent clients. The public defender in *Peart*, Rick Teissier, presented evidence that, at the time of his appointment, **[**122]** he was personally handling 70 active felony cases. His clients were routinely incarcerated 30 to 70 days before he was able to meet with them. In a seven month period, Teissier represented 418 defendants. Of these, he entered 130 guilty pleas at arraignment. Teissier had at least one serious case, defined as an offense necessarily punishable by a jail term which may not be suspended (including first degree murder, second degree murder, aggravated rape, aggravated kidnapping, armed robbery and possession of heroin), set for trial for every trial date during that seven month period. Teissier's public defender's office only had enough funds to hire three investigators to assist in the investigation of 7000 cases annually in ten sections of court. Teissier presented evidence that in a routine case, he received no investigative support at all. The public defender's office had no funds for expert witnesses; its library was inadequate. *Peart*, 621 So.2d at 784.

We find the circumstances which were confronting Ware are easily [Pg 70] distinguishable from the circumstances with which attorney Tessier had to contend as public defender in *Peart*. Moreover, our own review of the record shows **[*1077]** that **[**123]** Reeves' counsel acted professionally and knowledgeably throughout the pretrial proceedings. Counsel's representation, especially when challenging the scientific evidence presented by the state, showed tremendous preparation and skill. We find no error in the district court's ruling which held that Ware failed to provide sufficient evidence to show that his caseload was so burdensome, and the resources available to him were so limited, as to result in the delivery of constitutionally

ineffective assistance of counsel. *See also State v. Lee*, 2005-2098 p. 42-43 (La. 1/16/08), 976 So.2d 109, 138, *cert. denied*, U.S. , 129 S.Ct. 143, 172 L.Ed.2d 39 (2008).

Denial of Motion for Continuance

The defense contends that the district court's denial of a motion for continuance, filed a week before trial, rendered Reeves' right to counsel "an empty formality." [147]

FOOTNOTES

147 Appellant's Brief, p. 20.

The record shows that the district court originally upset the date for the retrial at the March 23, 2004 hearing due to the issue of lack of funding. At that time, a new date for the retrial was set for October 12, 2004. Consequently, Ware and St. Dizier, later joined by White, had approximately six and **[**124]** a half months to prepare for Reeves' retrial. The record shows that the defense filed a motion for continuance on October 5, 2004; [148] and an expedited hearing on the motion was held on October 6, 2004. [149]

FOOTNOTES

148 Vol. 12, p. 2926-2927.

149 *See* Vol. 18, p. 4347-4398.

At the hearing, Ware and St. Dizier argued they had not had sufficient time to prepare, that the case involved complicated issues which required more analysis, that they had recently discovered a missing box of information provided by former [Pg 71] counsel, and that, in St. Dizier's case, on-going concerns with ill and elderly parents had prevented him from completing his preparation. [150] White added that DNA test results were outstanding, but were expected within the next week.

FOOTNOTES

150 The record established that on May 27, 2004, the defense received 11 boxes from Cuccia and da Ponte containing all of their information, documents, trial preparation and strategy from the first trial. *See* Vol. 11, p. 2680. Testimony at the hearing showed that a 12th box, originally looked through by White, and purporting to contain mitigation information, had been lost in transit as the boxes were shared with the Louisiana Crisis Assistance Center, **[**125]** which was providing additional assistance to Ware.

The district court denied the defense motion for continuance, stating that the court had carefully monitored the case since its reassignment to original counsel. [151] After reciting the test for ineffective assistance of counsel in *Strickland v. Washington*, [152] Judge Canaday indicated that the defense fears of ineffectiveness to date were premature: "[u]p to this point the Court cannot say that there's been any deficiency nor has [sic] any specific deficiencies been pointed out, only some possibilities that may occur which may or may not be an issue further down the road." [153] The court noted the defense had aggressively challenged new issues and evidentiary matters raised by the state. [154] In acknowledging that the defense was currently in a pretrial posture, Judge Canaday commented:

[*1078] While the Defense team may not feel they are ready to proceed, that is based on an internal assessment and is not consistent with the Court's review of both the adversarial proceedings as well as the ex parte proceedings of which the record will speak for themselves on a number of occasions. [155]

FOOTNOTES

[151] Vol. 18, p. 4378.

[152] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[153] Vol. **[**126]** 18, p. 4380.

[154] Vol. 18, p. 4381.

[155] Vol. 18, p. 4381.

In reviewing the guidelines adopted by the American Bar Association relating to the performance of defense counsel, and considered by the Supreme Court in [Pg 72] reviewing claims regarding effectiveness of counsel in a capital case, the district court found that each factor was satisfied by defense counsel. [156] Judge Canaday noted that Ware had established a relationship with the defendant, both through representation on Reeves' simple escape case and upon Ware's being reappointed to the capital representation. The district judge stated that, not only had defense counsel indicated on the record that they had discussed matters with their client on a number of occasions, defense counsel also brought to the court's attention that they had taken advantage of the unique opportunity to discuss the case with prior counsel on several occasions. [157] To the extent that the judge was aware of the defense's investigation, the district court was satisfied that a complete and thorough investigation was being conducted. Important to this consideration was the defense's knowledge of and access to the state's complete first trial and the retention **[**127]** of the same experts. Although the district court had been informed for the first time about the missing file box, the court believed the defense had sufficient time to develop an appropriate mitigation strategy, considering the independent work the defense had already made on those issues. [158] As far as the factor of the

defense counsel's caseload, Judge Canaday deferred to the record of the March 23, 2004 hearing and the information conveyed in the proffer of September 24, 2004 as to Ware's unique position and workload. [159] Finally, the court was aware of "no stone that has been left unturned by the Defense team up to this point leading up and to jury selection and ultimately [Pg 73] trial." [160] The district judge denied defense counsel's motion for continuance, filed a week before trial was to commence, finding the motion had no merit. [161]

FOOTNOTES

156 Judge Canaday specifically mentioned the Supreme Court cases of *Wiggins v. Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527, 2535-2536, 156 L.Ed.2d 471 (2003) and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The petitioners in both of these cases had been convicted in state court of murder and sentenced to death. Each brought **[**128]** federal habeas claims of ineffective assistance of counsel based on counsels' failure to investigate and to present substantial mitigating evidence to their sentencing juries.

157 Vol. 18, p. 4382.

158 Vol. 18, p. 4383-4384.

159 Vol. 18, p. 4385-4386.

160 Vol. 18, p. 4386.

161 Vol. 18, p. 4387.

This Court has consistently held that [HN43] the decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb such a determination absent a clear abuse of discretion. La.C.Cr.P. art. 712; [162] *State v. Turner*, 2008-0289 p. 1 (La. 2/8/08), 974 So.2d 12; *State v. Blank*, 2004-0204 p. 9 **[*1079]** (La. 4/11/07), 955 So.2d 90, 140, *cert. denied*, U.S. , 128 S.Ct. 494, 169 L.Ed.2d 346 (2007). *Blank* additionally noted that this court "generally declines to reverse convictions even on a showing of an improper denial of a motion for a continuance absent a showing of specific prejudice." *Id.*

FOOTNOTES

162 La. C.Cr.P. art. 712 provides: [HN44] "A motion for continuance, if timely filed, maybe granted, in the discretion of the court, in any case if there is good ground

therefor."

We find no abuse of discretion in the district court's denial of the defense **[**129]** motion for continuance. Defense counsel had almost seven months to prepare for Reeves' retrial. For four and a half months of that time period, the defense additionally had available the transcripts and evidence consisting of the entire first trial presented by the state, information and materials compiled by counsel for the first trial, and the opportunity to confer with prior counsel. The testimony at the motion hearing shows that the defense availed itself of those advantages, consulting with prior counsel on more than one occasion and even requesting additional assistance from other defense entities. The record shows that the district court closely monitored the case, holding a status hearing every week to address any impediments in a timely fashion and to resolve them as they arose. [163] Thus, the district court had [Pg 74] a more extensive knowledge of counsel-preparedness than in the typical case. [164] We find the district court carefully considered the circumstances of this case in making its ruling and we find no abuse of discretion in its denial of the defense motion for continuance. Further, in our review of the record, we find no example of specific prejudice suffered by **[**130]** the defendant as a result of the denial of this motion for continuance. [165]

FOOTNOTES

163 Vol. 15, p. 3648.

164 Vol. 15, p. 3651. The court also granted Ware an additional three weeks to prepare for pending motions. Vol. 15, p. 3745.

165 In an attempt to show that the defendant was prejudiced by the denial of the continuance motion, defense counsel on appeal asserts that the record shows that Ware did not watch the videotaped confession in its entirety prior to trial and that, through this ineffective assistance, prejudicial material was placed before the jury. However, defense counsel is factually inaccurate. The record shows that, while Ware watched only portions of the videotape in the months prior to trial, once he was in Baton Rouge for jury selection, he watched the entire videotape. "I would start and stop and start and stop, so that's why I took it to Baton Rouge. And I said, "Well, I need to sit down and look at this tape, **which I did.**" Vol. 40, p. 9764 (emphasis added).

Conflict of Interest

The defendant contends that Ware had a conflict of interest in representing him on the first degree murder charge. The basis for this contention is the fact that Ware

had an actual conflict of interest **[**131]** in his representation of Reeves on the separate escape charge, which ultimately resulted in the reversal of that conviction. In a misleading argument, which confuses the records of each case, defense counsel on appeal cites to attorney statements found in a hearing within the escape case, and information disclosed in the *Jackson* hearing in the present case, as support for his contention: (1) that Ware had a conflict of interest *in this case*; (2) that Ware informed the court of a conflict of interest *in this case*; and (3) that Ware objected on the record *in this case* to a conflict of interest. A review of the record, and of the court of appeal's reported decision reversing Reeves' conviction on the escape charge, contradict these meritless implications.

Attempted Simple Escape Charge

[Pg 75] While awaiting trial on the instant first degree murder charge, Reeves and another prisoner tried to escape from the **[*1080]** Calcasieu Correctional Center. [166] Reeves was charged with attempted simple escape. [167] Ware was appointed to represent him on that charge. At that time, Cuccia and da Ponte represented Reeves on the first degree murder charge.

FOOTNOTES

166 *State v. Reeves*, 2004-0631 p. 2-3 (La. App. 3 Cir. 11/10/04), 890 So.2d 590, 592-593.

167 Vol. **[**132]** 15, p. 3581.

Within the escape matter, Ware filed a motion on Reeves' behalf for the appointment of "conflict-free counsel," asserting that the public defender's office had a conflict of interest in representing Reeves on the escape charge due to the fact that the public defender's office represented many of the inmates at the correctional center where Reeves was held. [168]

FOOTNOTES

168 Vol. 15, p. 3582.

A hearing was held on Ware's motion on February 4, 2004, and the transcript of that hearing within the escape prosecution was, for unknown reasons, placed into the record of the first degree murder case. [169] At the hearing, Ware asserted that Reeves' co-defendant on the escape charge, for a period of time, as well as other prisoners housed in the facility from which Reeves tried to escape (and thus potential witnesses at the trial on the escape charge), were clients of the public defender's office. [170] Ware asserted that, if new counsel were not appointed for Reeves, the public defender's office would be put in the position of cross-examining its present or former clients while defending Reeves on the escape charge. Ware urged caution in the court's ruling on the conflict motion, knowing that a **[**133]** conviction on the escape charge would likely be used in the penalty phase of Reeves' pending

prosecution for [Pg 76] first degree murder. Should the escape conviction be later reversed, there might be implications for a death sentence obtained with the introduction of evidence regarding the escape conviction. After hearing the arguments of counsel, the district court denied the motion, stating that any potential conflicts with specific witnesses could be dealt with at the trial of the escape charge. [171]

FOOTNOTES

[169] *See* Vol. 15, p. 3580-3623.

[170] Vol. 15, p. 3582-3591.

[171] Vol. 15, p. 3619-3521.

During the trial on the escape charge, the state called as a witness inmate Kevin Courville, who was a former client of the public defender's office. Several attorneys in that office represented Courville on several different charges, including Ware. Ware again raised the issue of conflict of interest in the trial of the escape charge, complaining that he would have to cross-examine a former client. The district court found an actual conflict of interest, but allowed the trial on the escape charge to continue after Courville waived his attorney-client privilege. Reeves was convicted of attempted simple escape.

On **[**134]** appeal, the court of appeal reversed Reeves' escape conviction and vacated the sentence. [172] The Third Circuit determined that, having found an actual conflict of interest, the trial court was required to take the proper steps to protect Reeves' right to effective assistance of counsel. The appellate court held that the conflict was not the witness' to waive; rather, the only proper recourse to protect Reeves' right to effective counsel was to appoint new counsel who did not have a conflict of interest with the state's witness. The court of appeal did not reverse Reeves' **[*1081]** conviction for attempted simple escape until **after** his retrial for first degree murder.

FOOTNOTES

[172] *State v. Reeves*, 2004-631 p. 9-11, 890 So.2d at 596-597.

First Degree Murder Charge

At the March 23, 2004 hearing at which the district court reappointed Ware to represent Reeves in his retrial, and in hearings held thereafter, the court noted that [Pg 77] Ware and Reeves had an attorney-client relationship based on Ware's representation of Reeves on the attempted simple escape charge. [173] At the time of his re-appointment, Ware announced to the court that he knew of no conflict of interest which would prevent him from representing **[**135]** Reeves on the first degree murder charge. [174]

FOOTNOTES

173 1st Supp. Vol. 4, p. 858, Vol. 17, p. 4175.

174 1st Supp. Vol. 4, p. 819.

The state gave the defense pretrial written notice of its intention to use the attempted simple escape conviction as evidence of Reeves' character and propensities in the penalty phase, should a penalty phase become necessary upon Reeves' conviction on the first degree murder charge. [175] A pretrial hearing was held to determine what information the state would be allowed to admit into evidence on Reeves' prior convictions. At that time, then-defense counsel da Ponte indicated at the hearing that Ware, whose office represented three of the possible inmate witnesses on the escape charge, informed her that he was advising his clients to assert their Fifth Amendment rights and would not allow da Ponte to speak to the inmates on behalf of Reeves. [176] At the conclusion of the hearing, the district court ruled that the state's evidence of Reeves' attempted simple escape conviction would be admissible in the penalty phase of the first degree murder trial. [177]

FOOTNOTES

175 Vol. 3, p. 716.

176 1st Supp. Vol. 4, p. 765.

177 1st Supp. Vol. 4, p. 769.

Reeves' first trial did not hold a penalty **[**136]** phase because the jury failed to reach a unanimous decision on guilt. Consequently, there was no mention of the escape conviction in Reeves' first trial. Although the evidence of the escape conviction was ruled admissible prior to the retrial of Reeves' first degree murder charge, the state, perhaps anticipating the reversal of the escape conviction, refrained from introducing [Pg 78] any evidence of that escape conviction in the penalty phase on retrial.

Analysis

HN45 As a general rule, Louisiana courts have held that an attorney laboring under an actual conflict of interest cannot render effective legal assistance to the defendant whom he is representing. *State v. Cisco*, 2001-2732 p. 17 (La. 12/3/03), 861 So.2d 118, 129, *cert. denied*, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004). An actual conflict of interest has been defined, as follows:
If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to the other client. [178]

The issue **[**137]** of conflicting loyalties may arise in several different contexts, [179] but may include the circumstance "where an attorney **[*1082]** runs into a conflict because he or she is required to cross-examine a witness who is testifying against the defendant and who was or is a client of the attorney." *Cisco*, 2001-2732 p. 17, 861 So.2d at 129, *citing State v. Tart*, 1993-0772 p. 19 (La. 2/9/96), 672 So.2d 116, 125, *cert. denied*, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996).

FOOTNOTES

[178] *Cisco*; 2001-2732 p. 18, 861 So.2d at 130, *citing Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979), *cert. denied*, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979).

[179] *See State v. Kahey*, 436 So.2d 475, 485-486 (La. 1983).

HN46 If the issue of counsel's alleged conflict of interest is raised in a pretrial setting, the district court has two options: "appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interest is too remote to warrant separate counsel. ... Failure to do one or the other in a case in which an actual conflict exists requires reversal." *Cisco*, 2001-2732 p. 17, 861 So.2d at 130. If the issue of counsel's alleged conflict of interest is not raised until after trial, "the defendant must **[**138]** prove that an actual conflict of interest adversely affected his lawyer's performance." [Pg 79] *State v. Kahey*, 436 So.2d 475, 484 (La. 1983). Because the prejudice to the defendant may be subtle, even unconscious, "where the conflict is real, a denial of effective representation exists without a showing of specific prejudice." *Id.*, 436 So.2d at 485.

The first step in the analysis of an alleged conflict of interest raised either pretrial or post-trial is whether an actual conflict of interest existed. We find it to be unnecessary to determine the timing of the challenge in this case because we find that Reeves fails to prove that his counsel labored under a conflict of interest while representing him for first degree murder. [180] There was no actual conflict in Ware's representation of Reeves in the guilt phase of the first degree murder trial because Ware was not called upon to cross-examine any of his former or current clients in the state's prosecution. Furthermore, there was no actual conflict of interest in the penalty phase because the state did not present evidence of Reeves' prior conviction for attempted simple escape. Even if the state had presented evidence of this prior conviction, **[**139]** and a former or current client of Ware had been called to testify by the state, the district judge would have had available to him the alternative remedy of having second chair counsel, who was not similarly conflicted, conduct the cross-examination of those witnesses. *See Cisco*, 2001-2723, p. 25, 861 So.2d at 134.

FOOTNOTES

[180] In this case, Ware did not inform the court of an alleged conflict of interest pretrial in the first degree murder case. Instead, Ware asserted he had no conflict

of interest in representing Reeves in this matter. However, the pretrial standard of review would also be applicable if this court found the district judge knew or should have known that the possible conflict issue existed.

The record shows that Judge Canaday presided over the hearing on the conflict motion in the attempted simple escape matter at which Ware claimed his office represented several of the inmates. at the jail. Judge Canaday also presided over the trial of the attempted simple escape charge where Ware informed him that one of the state's witnesses was a former client. Judge Minaldi presided over the *Jackson* hearing in the first degree murder case and ruled the state's evidence of Reeves' prior conviction **[**140]** for attempted simple escape was admissible in evidence at a possible penalty phase in the first degree murder trial. Although defense counsel raises a question whether Judge Canaday knew or should have known that there was a possibility for a conflict of interest to arise in the retrial of the first degree murder trial, we find no actual conflict of interest ever arose.

The nature of Ware's conflict of interest in the escape trial was based on the [Pg 80] fact that the state called, as a witness in the escape trial, a former client of Ware's. The conflict of interest in that trial had nothing to do with Ware's relationship with Reeves *per se*. Consequently, defense counsel on appeal cannot bootstrap **[*1083]** Ware's conflict of interest in the escape trial, based on Ware's representation of other indigent client witnesses in that representation, to Ware's representation of Reeves on the first degree murder charge, based on an argument that "once conflicted, always conflicted." Since no actual conflict of interest ever arose in his first degree murder trial, Reeves fails to prove reversible error in this assignment of error.

Finding that none of the assignments of error raised by the defendant constitute **[**141]** reversible error, we now review the record to determine if the sentence of death imposed in this case is constitutionally excessive.

CAPITAL SENTENCE REVIEW

HN47 Article 1, § 20 of the Louisiana Constitution prohibits cruel, excessive, or unusual punishment. La. C.Cr.P. art. 905.9 provides that this court shall review every sentence of death to determine if it is excessive. The criteria for review are established in La. Sup. Ct. Rule 28, § 1, which provides:

HN48 Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(a) Passion, Prejudice or any other Arbitrary Factors

The defendant argues the removal of the attorneys of the Capital Defense [Pg 81] Project and the re-appointment of the local Chief Public Defender as his counsel in the retrial of this matter **[**142]** resulted in the death penalty being wantonly, freakishly and arbitrarily imposed. Our analysis of the defendant's assignments of error with regard to counsel issues, discussed in the main opinion, has found that this was not so. In other assignments of error, discussed in the unpublished appendix, the defendant urges that arbitrary factors were introduced into both the culpability and penalty phases of trial. We have analyzed each assignment of error under established principles of law and determined that each issue raised was without merit.

Further, nothing in the record suggests prejudice was an issue in the trial. Defendant, an adult white male, raped and stabbed to death a 4 year old white female child and received a sentence of death. Both the defendant and the victim were local residents in a small community. The jury which determined culpability and sentence was selected from another jurisdiction, and consisted of 7 white jurors and 5 black jurors, 7 men and 5 women. The jury venire was questioned thoroughly to discover instances of prejudicial pretrial publicity.

In the Uniform Capital Sentence Review, the district judge noted that, during specific portions of the trial, one **[**143]** or more jurors became visibly emotional. Despite this observance, the trial judge concluded: "[w]hile noting the brief emotional incidents, it is the Court's opinion and observation that passion, prejudice or arbitrary factors did not influence the jury in imposing sentence, but were human reaction to fact situations." [181] Our independent review **[*1084]** of the record finds no indicia of improper passion, prejudice or arbitrariness.

FOOTNOTES

181 Uniform Capital Sentencing Review, Section D(6), "General Considerations."

(b) Statutory Aggravating Circumstances

The jury in its verdict found the following aggravating circumstances:
[Pg 82] (A) the offender was engaged in the perpetration or attempted perpetration of aggravated rape (La. C.Cr.P. art. 905.4(A)(1));

(B) the victim was under the age of twelve years (La. C.Cr.P. art. 905.4(A)(10)); and

(C) the offense was committed in an especially heinous, atrocious, or cruel manner (La. C.Cr.P. art. 905.4(A)(7)). [182]

FOOTNOTES

182 Vol. 44, p. 10879.

HN49 Pursuant to La. C.Cr.P. art. 905.3, a jury need find only one aggravating circumstance in order to consider imposing a sentence of death. [183] It is undisputed that the victim, M.J.T., was under the age of 12 years. Consequently, the **[**144]** evidence undeniably supports the jury's finding of that statutory aggravating circumstance, and the sentence of death is adequately supported by the existence of an aggravating factor.

FOOTNOTES

183 La. C.Cr.P. art. 905.3 provides, in pertinent part, HN50 "[a] sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."

Although we could end our analysis of whether the evidence supports an aggravating circumstance at this point, we find the evidence fully supports the other aggravating circumstances unanimously found by the jury, as well. Rape is defined as: HN51 "the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent." La. R.S. 14:41(A). Aggravated rape is defined at La. R.S. 14:42, in pertinent part:

HN52 **§ 42. Aggravated rape**

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed **[**145]** under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.

(2) When the victim is prevented from resisting the act by threats [Pg 83] of great and immediate bodily harm, accompanied by apparent power of execution.

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.

(4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

As demonstrated by the jury's verdict during the guilt phase of the trial, the state presented sufficient evidence to prove beyond a reasonable doubt that defendant was engaged in the perpetration of the aggravated rape of a child who was under the age of 12 when he killed this four year old victim. As previously stated, sufficiency of the evidence was not urged as an assignment of error in this appeal. Indeed, appellate defense counsel, during oral argument in this court, described the state's evidence against the defendant as "overwhelming." We agree.

In the guilt phase of trial, the jury learned that the defendant admitted to abducting M.J.T. and taking her to an **[**146]** isolated area where he began to molest her. Although he claimed that he could **[*1085]** not recall what transpired thereafter, he admitted that he came to himself, alone, at his vehicle, with his pants unzipped and his pocket knife missing. The brutally-assaulted body of M.J.T. was found in the isolated area described by the defendant. The evidence showed she had been anally raped and repeatedly stabbed. Expert forensic analysis matched the semen obtained from a rectal swab of the victim to Reeves' DNA profile, with a statistical probability of 1 in 256,000,000,000 (trillion). In addition, fibers consistent with the victim's clothing were found in the defendant's car. A man-trailing dog alerted to the passenger side of the defendant's vehicle after receiving a scent exemplar of the victim. We find the evidence supports the jury's unanimous finding that the defendant killed M.J.T. during the perpetration or attempted perpetration of an aggravated rape.

Finally, HN53 this court "has given the statutory aggravating circumstance of [Pg 84] heinousness a narrow construction, requiring 'that to be valid there must exist elements of torture, pitiless infliction of unnecessary pain or serious bodily abuse **[**147]** prior to death.'" *State v. Manning*, 2003-1982 p. 67-68 (La. 10/19/04), 885 So.2d 1044, 1103, *cert. denied*, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005); *see also State v. Brogdon*, 457 So.2d 616, 630 (La. 1984), *cert. denied*, 471 U.S. 1111, 105 S. Ct. 2345, 85 L. Ed. 2d 862 (1985). "Torture requires evidence of serious physical abuse of the victim before death." *Manning*, 2003-1982 p. 69, 885 So.2d at 1104; *State v. Sonnier*, 402 So.2d 650, 659 (La. 1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). In addition, "[t]his Court has also held that the murder must be one in which the death was particularly painful and one carried out in an inhumane manner." *Manning*, 2003-1982 p. 68, 885 So.2d at 1103. A victim's "awareness of impending doom" is relevant to a finding of heinousness. *Manning*, 2003-1982 p. 70, 885 So.2d at 1104.

During the guilt phase of the trial, the jury was exposed to the exact manner in which the defendant inflicted the fatal wounds upon M.J.T. The 4 year old victim was stabbed 16 times. The victim's hands showed defensive wounds, revealing her awareness of the assault, and her attempt to protect herself. The victim's neck was cut for two-thirds **[**148]** of its entire circumference. M.J.T.'s legs were scraped, showing she had been dragged. Although she sustained multiple stab wounds in the heart, the coroner testified that she survived for some time despite this incredible trauma. [184] We [Pg 85] find the evidence presented fully supports the jury's unanimous finding of the remaining statutory aggravating circumstance, **[*1086]** and that the offense was committed in an especially heinous, atrocious or cruel manner.

FOOTNOTES

184 The coroner's testimony on cross-examination in this regard was as follows:

Defense counsel: The wounds in the area of the heart would have killed this child very quickly?

Coroner: No, sir. That's the sad part, it wouldn't have. I think she suffered for awhile, because -- the reason I say that is because the injuries that she has involving the heart, as well as the lungs -- if you were to be shot in the chest with a shotgun, you have ten seconds worth of oxygen in your brain. I mean, that's without a heart. And the heart is a thick muscle. The heart is like an inner tube. If any of you have ever had a puncture proof inner tube, the heart is a lot like that, where you poke a hole in it and it has a tendency -- the thick muscle wall **[**149]** closes. So, I think that she was alive for a period of time. How long, I don't know. It all depends on the duration and the time span between the stab wounds.

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Defense counsel: So, a four-year-old child with five stab wounds to the heart itself, you're saying would survive for some time?

Coroner: Yes, sir. Absolutely.

Vol. 41, p. 10224-10225.

(c) Proportionality to the Penalty Imposed in Similar Cases

HN54 Federal constitutional law does not require a proportionality review. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Nonetheless, La. Sup. Ct. R. 28 § 4(b) provides that the district attorney shall file with this court a list of each first degree murder case in the district in which the sentence was imposed after January 1, 1976. This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender.

The Sentence Review Memorandum submitted by the state reveals that; since 1976, sixty-eight defendants have been charged with one or more counts of first degree murder in the Fourteenth Judicial District. Of that number, nineteen have proceeded to trial on the charge of **[**150]** first degree murder. 185 Of those nineteen first degree murder prosecutions, juries have returned verdicts of guilty as charged and a [Pg 86] sentence of death on nine occasions. 186 Two of those convictions have been

reversed and are awaiting retrial.[187] In six of those convictions, the death sentence has been reduced to a life sentence on appeal or on federal habeas review, or the defendant was found to be mentally retarded or incompetent to assist in his appeal.[188] One of the nine defendants who was sentenced to death has been executed.[189]

FOOTNOTES

185 In forty-five of those cases, the defendant was allowed to plead guilty to first degree murder with a life sentence, or to a lesser-included offense. In three other cases, the bills of indictment were amended to second degree murder and proceeded to trial on that charge. Of those three second degree murder prosecutions, juries found two of the defendants, guilty as charged; the other defendant was found to be not guilty.

186 One prosecution resulted in a determination that the defendant was not guilty by reason of insanity. *State v. Richard*, 14th JDC Docket No. 3209-79.

187 *State v. Langley*, 1995-1489 (La. 4/14/98), 711 So.2d 651, *opinion after* **[**151]** *remand*, 1995-489 (La. 4/3/02), 813 So.2d 356, *State v. Langley*, 2004-0269 (La. App. 3 Cir. 12/29/04), 896 So.2d 200; *disapproved of by*, 2006-1041 (La. 5/22/07), 958 So.2d 1160; *State v. Cisco*, 2001-2732 (La. 12/3/03), 861 So.2d 118, *cert. denied*, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004).

188 *State v. English*, 367 So.2d 815 (La. 1979); *State v. Sylvester*, 400 So.2d 640 (La. 1981); *State v. Perry*, 420 So.2d 139 (La. 1982), *cert. denied* 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983); *State v. Dugar*, 527 So.2d 307 (La. 1988); *Dugar v. State*, 615 So.2d 1333, 1334 (La. 1993); *transferred to*, 1993-718 (La. App. 3 Cir. 10/5/94), 643 So.2d 870, *writ denied*, 1994-2712 (La. 6/30/95), 657 So.2d 1019; *State v. Cross*, 1993-1189 (La. 6/30/95), 658 So.2d 683, *overruling recognized in State v. Juniors*, 2003-2425 (La. 6/29/05), 915 So.2d 291, *cert. denied*, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006); *State v. Mitchell*, 1994-2078 (La. 5/21/96), 674 So.2d 250, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996);

189 *State v. Martin*, 1993-0285 (La. 10/17/94), 645 So.2d 190, *cert. denied*, 515 U.S. 1105, 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995).

From these facts, the **[**152]** defendant argues that the death penalty in the Fourteenth Judicial District is imposed in a wanton and freakish manner, considering the small number of cases in which a jury in that jurisdiction actually imposes death. [190] **[*1087]** However, we note that the vast majority of cases which have been indicted as a first degree murder in this jurisdiction involve a killing during either a robbery or a drug-related offense. [191] Children have been the victims in only four of the sixty-eight first degree murder indictments. Only one of the cases with a child victim has facts [Pg 87] comparable with the instant case, *State v. Langley*. [192] After an involved case history, *Langley* is currently awaiting retrial.

FOOTNOTES

[190] In addition, the defense contends the state has failed to include several first degree murder prosecutions in its listing of cases. We agree there are possible omissions in the state's Sentence Review Memorandum. However, these omissions do not significantly impact our analysis here, considering the dearth of comparable cases within this jurisdiction where the victim was a young child killed during the perpetration or attempted perpetration of an aggravated rape.

[191] Forty-four of the sixty-eight **[**153]** indictments for first degree murder involved an aspect of robbery or a drug-related offense.

[192] *See State v. Giovanni*, 375 So.2d 1360 (La. 1979); *appeal after remand*, 409 So.2d 593 (La. 1982), a husband and wife were shot in their home and the house was set afire. Their infant son perished, as well, but the evidence that the infant was also shot was inconclusive. The jury returned with a verdict of guilty as charged on three counts of first degree murder and sentenced the defendant to life. In *State v. Larson*, 579 So.2d 1050 (La. App. 3 Cir. 1991), *writ denied*, 588 So.2d 1110 (La. 1991), the defendant, who was babysitting a 17 month old infant, was charged with first degree murder in connection with the child's death. At trial, the defendant claimed he had tripped and fallen down stairs with the child, accounting for the child's injuries. A jury convicted the defendant of manslaughter. In *State v. Trahan*, 14th JDC Docket No. 10277-91, the defendant was indicted for first degree murder but was allowed to plead guilty to cruelty to a juvenile. The evidence showed the defendant suffocated the victim while holding the victim too tightly in an attempt to stop the infant from crying. In *State v. Langley, supra*, **[**154]** the state contends the defendant ejaculated into the mouth of the 6 year old victim, strangled him, then stuffed the victim's body in a closet.

Given the scarcity of comparable cases in Calcasieu Parish, [HN55] this court has held that we may look beyond the judicial district in which the sentence was imposed and conduct the proportionality review on a state-wide basis. A state-wide review of cases reflects that jurors find the death penalty appropriate in cases in which the victim is a young child and where the murder is committed during the perpetration or attempted perpetration of an aggravated rape. *See State v. Connolly*, 1996-1680 p. 19 (La. 7/1/97), 700 So.2d 810, 823 (and cases cited therein, 1996-1680 p. 19 n. 11, 700 So.2d at 823, n.11).

The Uniform Capital Sentence Report ("UCSR") and the Capital Sentence Investigation Report ("CSIR") indicate the defendant, Jason Reeves, is a white male born on January 8, 1975. He was 26 years old at the time of the offense. Defendant is unmarried and has no children or other dependents. He was living with his mother at the time he murdered M.J.T.

Reeves is one of three children born to the on-again, off-again common law union of Judy Ann Doucet and **[**155]** Larry Manuel Reeves. The defendant grew up in the rural community of LeBleu Settlement near Lake Charles and Iowa, Louisiana. Reeves' parents separated for a significant period of time during Reeves' early [Pg 88] childhood, during which time his mother married Dennis Mott, whom Reeves' mother described as emotionally abusive to her and her children.

One of Reeves' siblings, Patricia Renee, was killed in a tragic accident in 1986, when Reeves was 9 or 10 years old. His other sibling, Ronald Wayne, is currently serving a life sentence at the state penitentiary for a murder he committed in 1994. Reeves was sexually abused by a friend of the family, George Reed, when he was 14 years old. Reed was charged with the aggravated rape of Reeves, but was allowed to plead guilty to aggravated crime against nature.

[*1088] Reeves' parents indicated Reeves suffered from headaches and black outs from the time he was a small child but denied any mental health problems. He is of medium intelligence, with an IQ within the 70 to 100 range. Reeves dropped out of school before completing the 7th grade, where he was a below average student academically and a disciplinary problem. He has not obtained a GED. He has **[**156]** no other formal education or job training.

Reeves' past employment history is described in reports generally as "various labor positions" of unknown duration. For an unknown period of time, Reeves worked as a deckhand for an oil field related company. He was working as an insulator for an insulation company at the time he murdered M.J.T.

At trial, the defense presented extensive evidence of Reeves' character and behavioral disorders, both to challenge the validity of the confession and in the penalty phase as mitigation. According to an expert forensic psychologist, Reeves suffers from major depression and mixed personality disorder, with borderline and anti-social personality traits. Another defense expert related that the defendant exhibits emotional instability, volatile interpersonal relationships, anger, mood swings and impulsivity. However, Reeves does not suffer from a mental disease or [Pg 89] defect which would prevent him from being able to distinguish right from wrong.

Reeves had a prior criminal history. The UCSR and CSIR relate that Reeves had two juvenile adjudications for burglary, one occurring June 11, 1991, and the other occurring June 17, 1991. On October 10, 1991, **[**157]** he was adjudicated a delinquent and sentenced to four years at a juvenile detention facility. [193] His adult record includes a conviction for indecent behavior with a juvenile, which occurred on January 3, 1996. He was sentenced to four years hard labor, with three years of the sentence suspended. His probation for this offense was revoked on May 5, 1997, when he pleaded guilty to another charge of indecent behavior with a juvenile, with this offense occurring on March 29, 1997. He was sentenced to four years and was released from incarceration on March 29, 2001, after serving the entirety of his sentence. The CSIR shows that at the time the report was completed, Reeves had two pending charges for obscenity, as well as simple battery and criminal trespass. As previously stated within this opinion, Reeves' conviction for attempted simple escape was reversed on appeal.

FOOTNOTES

193 The CSIR additionally shows he committed the offense of possession of stolen things, for which he was adjudicated delinquent in 1989; the offense of remaining after forbidden, for which he received a disposition of six months probation in 1989; and the offense of theft, for which he was adjudicated delinquent in 1990.

In **[**158]** the UCSR, the trial judge noted, in answer to whether the sentence is disproportional: "As to comparing this case with other cases, this is clearly the worst factual case scenario presented to this Judge to date." [194] A comparison of this case with other, similar, first degree murder cases in the state as a whole convinces this court that the death sentence imposed in this case is not a disproportionately harsh sentence, considering the offense and the offender.

FOOTNOTES

194 Uniform Capital Sentence Review, Section D(7), "General Considerations."

[Pg 90] **DECREE**

For the reasons assigned herein, the defendant's conviction and sentence are affirmed. In the event this judgment becomes final on direct review when either: **[*1089]** (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under their prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under La.C.Cr.P. art. 923 **[**159]** of finality of direct appeal, and before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Public Defender Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under

La. R.S. 15:169; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

AFFIRMED.

NOTE TO PUBLISHING COMPANIES: THIS APPENDIX IS NOT DESIGNATED FOR PUBLICATION IN ANY PRINT OR ELECTRONIC FORMAT.

SUPREME COURT OF LOUISIANA

No. 2006-KA-2419 MAY 0 5 2009

STATE OF LOUISIANA

v.

JASON MANUEL REEVES

UNPUBLISHED APPENDIX

The appendix in this case contains this court's analysis of the remaining assignments of error, not treated in the published portion of this opinion, raised by the defendant, Jason Reeves.

PRETRIAL ISSUES

Assignments of Error 46-56
Denial of Motion to Suppress Statements

1. Defendant's statements were not coerced

The defendant asserts that inculpatory statements he made while initially in police custody were obtained through extreme psychological and emotional coercion. The defendant specifically points to a variety of factors as being unconstitutionally coercive. Finally, the defendant contends that the statements, admitted at trial, should have been suppressed, and that their consideration by the jury is reversible error.

Although the defendant does not specify which statements were involuntarily obtained, his arguments refer generally to the videotaped statements obtained from the defendant while in initial police custody. Other statements made by the defendant to law enforcement officers after the videotaped statements were made, while the defendant was in custody over the course of months while awaiting trial, and admitted in evidence at trial, are not addressed or challenged, and will not be considered here.

As stated in the fact section in the published portion of this opinion, Reeves initially denied involvement with the missing victim, M.J.T. Reeves first told officers he left work at 3:00 p.m. on November 12, 2001. He told them he stopped to get a soda at a store, but then went home where he watched a television program and took a bath. Reeves repeated this story throughout initial questioning.

As officers pointed out discrepancies and information obtained through their continuing investigation, Reeves expanded his story to admit that he had stopped at the Moss Bluff school earlier in the day. However, he told officers he was only turning around in the parking lot while on his way to visit family. Later, he admitted that he spoke with several young girls at the school and asked the girls if they were familiar with one of his cousins who had attended the school. He also later admitted that he had been driving around the trailer park where M.J.T. lived with her family. He claimed the reason he was at the trailer park was that he was looking for a former co-worker who drove a black truck with whom he wished to speak about obtaining work offshore. At this point, Reeves admitted he had seen children playing in the trailer park and, ultimately, that he spoke to the children in an attempt to find his former co-worker.

Throughout this questioning, Reeves stated that he was not concerned or worried. He specifically indicated that he had nothing about which to be scared. His body language on the videotape shows that he was sitting back in his chair calmly, arms clasped in front of him with his elbows wide. He mentioned having meals, cigarette breaks and getting sleep.

After M.J.T.'s body was found and Reeves was confronted with pictures of her brutally assaulted body, the subsequent videotape shows Reeves hunched in his chair with his head down. He made only occasional eye contact and had his arms tucked

close to his body. At this time, Reeves admitted that M.J.T. rode with him in his car and that he spoke to her about animals. He admitted that he took M.J.T. to the cemetery, sat with her by his sister's grave, helped M.J.T. over a fence into the surrounding woods, whittled a stick and talked to M.J.T. about rabbits. He claimed he then blacked out and that the next thing he remembered was getting back into his car at the cemetery, feeling scared, with his pants undone.

Further interrogation yielded Reeves' admission that he thought he may have stabbed M.J.T. with his pocket knife, with which he had been whittling, but that he did not know where his knife was now. Reeves speculated that he may have thrown the pocket knife in the cemetery on his way back to his car. Reeves also speculated that he may have taken off M.J.T.'s pants and shoes in the woods. He admitted that she was probably crying and asking to go home, and that he had told her several times he would take her home.

Reeves claimed he first became aware of himself while on his way home from the cemetery when his car overheated. He told the officers he had blacked out before, and the last time this had occurred, he had become angry while visiting his sister's grave. He had only been shocked back to reality on that previous occasion when he was involved in a minor traffic accident after leaving the cemetery.

Reeves stated he felt guilty for his sister's death because they argued the day she died. He said he had been having problems with anger ever since his sister's death and that, when he was angry, he wanted to take it out on anyone who was around him. Reeves admitted he had been very angry when he was with M.J.T. at the cemetery.

Prior to trial, Reeves filed two motions to suppress evidence. One motion sought to suppress inculpatory statements made by him, which will be addressed

herein, and the other suppression motion concerned the physical evidence obtained from his person, which will be discussed under another section of these assignments of error. The motion to suppress his statements was supplemented several times.

After testimony was adduced over the course of several hearings, the district court denied Reeves' motion to suppress statements and determined that the custodial statements at issue were admissible in evidence at trial, subject to redaction for other crimes evidence. In written reasons signed on October 30, 2002, the then-presiding district judge evaluated each specific ground upon which the defendant based his claim of coercion and concluded:

> [a]n examination of the totality of the circumstances in this case--even the cumulative effect of all the defendant's allegations considered together--firmly establishes that the defendant's statements were freely and voluntarily made and were not the result of the influence of fear, duress, intimidation, menaces, inducements, or promises.[1]

The court of appeal affirmed the district court after a thorough review of the facts and law, after defense writs were taken to review the suppression ruling.[2]

Before a confession may be admitted into evidence, the state has the burden of affirmatively showing the statement "was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises." La. R.S. 15:451; La. C.Cr.P. art. 703(D). If the statement was made during custodial interrogation, the state additionally must show the defendant was advised of, and waived, his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Manning*, 2003-1982 p. 14 (La. 10/19/04), 885 So.2d 1044, 1066, *cert. denied*, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). In *Miranda*, the Supreme Court:

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[1] Vol. 5, p. 1144-1146.

[2] Vol. 10, p. 2426-2449; *State v. Reeves*, 02-1427 c/w 03-43 (La. App. 3 Cir. 5/7/03) (not designated for publication).

> promulgated a set of safeguards to protect the there-delineated constitutional rights of persons subject to custodial police interrogation. In sum, the Court held in that case that unless law enforcement officers give certain specified warnings before questioning a person in custody,[3] and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary.

Michigan v. Moseley, 423 U.S. 96, 99-100, 96 S.Ct. 321, 324-325, 46 L.Ed.2d 313 (1975). The *Miranda* holding "protects an individual's Fifth Amendment privilege during incommunicado interrogation in a police-controlled atmosphere. *State v. Taylor*, 2001-1638 p. 6 (La. 1/14/03), 838 So.2d 729, 739, *cert. denied*, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). This court has held that "[w]hen claims of police misconduct are raised, the state must specifically rebut the allegations." *State v. Blank*, 2004-0204 p. 10 (La. 4/11/07), 955 So.2d 90, 103, *cert. denied*, __U.S.__, 128 S.Ct. 494, 169 LI.Ed.2d 346 (2007).

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress, including credibility determinations made therein, will not be disturbed absent an abuse of that discretion. *State v. Leger*, 2005-0011 p. 10 (La. 7/10/06), 936 So.2d 108, 122, *cert. denied*, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007); *Blank*, 2004-0204 p. 10, 955 So.2d at 103. "When deciding whether a statement is knowing and voluntary, a court considers the totality of circumstances under which it is made, and any inducement is merely one factor in the analysis." *Blank*, 2004-0204 p. 10, 955 So.2d at 103. Although not required to do so, an appellate court may review the testimony adduced at trial, in addition to the testimony adduced at the suppression

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[3] "The warnings must inform the person in custody 'that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.' 384 U.S., at 444, 86 S.Ct., at 1612." This footnote is in the original quotation.

hearing, in determining the correctness of the trial court's pre-trial ruling on a motion to suppress. *Leger*, 2005-0011 p. 10, 936 So.2d at 122; *State v. Sherman*, 2004-1019 (La. 10/29/04), 886 So.2d 1116.

In this case, the defendant does not contend that he asked for, and was denied, counsel during his custodial interrogation by police. Rather, the defendant contends that the circumstances of the questioning were unconstitutionally coercive. We will discuss each of the circumstances raised by the defendant.[4]

A. Length of the interrogation

The defendant contends that he was held and interrogated for over forty-eight hours, the first twenty-four hours of which consisted of a relay series of interrogators. Reeves argues these hours of relentless interrogation were inherently coercive.

In *Blank*, this court noted that, other than condemning as "inherently coercive" 36 hours of virtually continuous interrogation, the Supreme Court has not clarified the point at which the length of time of an interrogation renders statements obtained thereby to be involuntary. *Id.*, 2004-0204 p. 13, 955 So.2d at 105, *citing Ashcraft v. Tennessee*, 322 U.S. 143, 154, 64 S.Ct. 921, 88 L.Ed. 1192 (1944). *Blank* observed that "[i]n most state cases, confessions obtained after quite lengthy interrogations have been held to be voluntary and hence admissible." *Id.*, 2004-0204 p. 13, 955 So.2d at 105 (citations omitted).

In *Blank*, the defendant was interrogated continuously at a sheriff's substation for 12 hours. Like Reeves, Blank accompanied the officers to the station voluntarily and denied involvement in any of the murders at issue in that case for the first six hours in which he was in police custody. *Id.*, 2004-0204 p. 12-13, 955 So.2d at 104-105. While not dispositive on the issue of whether the confession was illegally

[4] Not all of the factors raised here were raised in the district court prior to trial; nevertheless, we will review each factor.

coerced, this court found that the officers' administration of *Miranda* warnings nine times during the interrogation weighed in favor of the state on the issue of voluntariness. *Id.*, 2004-0204 p. 14-15, 955 So.2d at 105. In addition, Blank was allowed to go to the restroom and drink sodas throughout the interrogation. Although Blank stated he was tired and cold, and indicated he was suffering intermittently with back pain throughout the interview, Blank never requested to terminate the interrogation nor did he ever invoke any of his *Miranda* rights. *Id.*

Applying the law to the facts of this case, we find the record shows that the duration of the interrogation, without more, did not render involuntary Reeves' inculpatory statements. *Blank*, 2004-0204 p. 13, 955 So.2d at 105. We note that Reeves was informed of his constitutional rights while still at his house, before sheriff's deputies asked him any questions. Reeves consented to taking a polygraph examination and drove his own vehicle to the Calcasieu Parish Sheriff's Office (CPSO). Once there, Reeves was again informed of his constitutional rights. Reeves signed *Miranda* forms acknowledging his rights and waiving them throughout questioning. At no time during the police questioning did Reeves assert his right to an attorney or seek to call a halt to the interrogation. Although Reeves was questioned, on and off, during the first twenty-four hours that he was at the CPSO, he denied involvement in the disappearance of M.J.T. throughout that time period. He was allowed to eat, to drink sodas, to smoke a cigarette and to return to his cell after his arrest on an outstanding warrant. Importantly, Reeves made no inculpatory statements during the first twenty-four hours of questioning.

Further, the record shows that for a significant period of time, from 5:40 p.m. on November 13, 2001, until 11:00 a.m. on November 14, 2001, Reeves was not questioned. The inculpatory statements made by Reeves were made after this period

of time during which he was allowed to sleep, to meet with his mother, and to eat. Under these circumstances, we find that Reeves has not demonstrated coercion resulting from the duration of police questioning. This claim lacks merit.

B. Threats to Kill Reeves' Dogs

Reeves asserts that Detectives Benovich and Zaunbrecher threatened to kill his dogs to coerce him into admitting that he was involved in the disappearance of the victim. At the suppression hearing, the detectives admitted that they told Reeves that his dogs, which he acknowledged were mean,[5] might have to be killed in order to obtain hair samples to prove that M.J.T. had been in his vehicle. Both detectives testified they did not view these statements as threats. Detective Benovich testified the statement was made to impress upon the defendant the serious nature of the investigation. Detective Zaunbrecher testified she believed the statement to be one of fact, and a real possibility, due to the fact that obtaining hair samples from these dogs for testing was a legitimate law enforcement concern. The defendant testified at the suppression hearing that the detectives' statements had bothered him.

The trial judge ruled as follows on this issue:

> The defendant testified that he was "bothered" by the detectives' assertions that they would have to "put down his dogs" to obtain hair samples. He in no way asserted that this caused him so much concern that his will was overborne and he confessed. Indeed throughout the recorded portions of his statements, he does not even manifest that he was bothered by it. The defendant has woefully failed to show that any such assertions rendered his statements involuntary. Although concerns that the police will inflict harm on another can be a factor in a voluntariness analysis, *State v. Wilms*, 449 So.2d 442 (La. 1984), the facts of this case do not begin to approach the seriousness of the facts in *Wilms* and that confession was found to be voluntary.[6]

After reviewing the videotaped statement, the court of appeal concurred with

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[5] *See* 1st Supp. Vol. 1, p. 123, 138. At trial, Deputy Mary Pierrotti stated that Reeves had "seven or eight dogs, very, very large dogs" which started barking when officers pulled up at the Reeves' residence. Vol. 38, p. 9400. She described the commotion as "very loud." *Id.*

[6] Vol. 5, p. 1144.

the trial court observation. "Defendant showed little or no response to the statements; his demeanor was passive. We find no error with the trial court's conclusion that Defendant's statements were not coerced by alleged threats to his dogs."[7]

Fear that police will inflict harm on someone, or something, other than the defendant is a factor to be considered in determining whether a confession is voluntary. *Wilms*, 449 So.2d at 444. In *Wilms*, the defendant and two others were apprehended by police as they fled toward their van in a parking lot near the restaurant where two men were robbed at gunpoint. The defendant's wife, who was waiting in the van, and who was two and a half months pregnant, was inexcusably struck in the stomach by an arresting officer. Upon being informed of these facts by Wilms, and being informed by Wilms' wife that she was bleeding and in pain, Wilms' interrogator told Wilms he would see what he could do about getting Wilms' wife to a doctor. Although Wilms testified that he was afraid his wife would not receive medical attention in the absence of his inculpatory statement, this court found the statement to be voluntarily made and admissible in evidence:

> Wilms was no doubt concerned about his wife and experienced psychological pressure in this regard. However, he was no doubt also feeling pressure as a result of being apprehended in front of a restaurant as a suspect in an armed robbery. One of his companions had a gun. The eyewitnesses were there. This was Wilms' first felony. Moreover, he probably felt responsible for having exposed his wife and child to such a risk.

Wilms, 449 So.2d at 445.

Our review of the videotape confirms the observations of the district court and the court of appeal. Although Reeves suggested to officers that his mother could help them obtain hair from his dogs, he does not appear upset by, or even concerned with, the statements by the detectives that the dogs might have to be killed in order to

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[7] Vol. 10, p. 2434.

obtain hair samples. Contrary to his suppression hearing testimony that he was "bothered" by the detectives' suggestion, his demeanor on the videotape fails to support an assertion that this concern was sufficient to overbear his will and coerce a confession from him.[8] This claim lacks merit.

C. Use of Polygraph and Its Results

The defendant complains that the interrogators used the polygraph examination and its results as a "third-degree" interrogation tactic. Reeves testified at the suppression hearing that he did not want to take a polygraph test, but officers told him he could either take the test voluntarily, or they would obtain a warrant to make him take the test.[9] After taking the test, and while still in the interview room, Reeves was told or overheard the polygraph examiner announce that the results indicated Reeves kidnapped and murdered M.J.T.[10]

The record shows that Reeves was informed of his constitutional rights while at his house, before he was asked to submit to a polygraph test.[11] Reeves drove himself to the CPSO and voluntarily agreed to a polygraph examination.[12] Reeves was again informed of his constitutional rights before he was given the test and waived them on a written rights form.[13] Under similar circumstances, where a defendant is advised of his constitutional rights and waives them before submitting to a polygraph examination, this court has upheld the admissibility of the defendant's subsequent statement as voluntary. *Blank*, 2004-0204 p. 18-20, 955 So.2d at 109-

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[8] 1st Supp. Vol. 1, p. 138.

[9] 1st Supp. Vol. 1, p. 119.

[10] *Id.*, p. 120.

[11] Vol. 14, p. 3313.

[12] Vol. 14, p. 3314.

[13] Vol. 14, p. 3338-3339.

110. This claim has no merit.

D. Temperature Control and Nicotine

The defendant claims that interrogators used temperature control and nicotine withdrawal as interrogation devices. The defense admits there is little evidence in the record regarding this issue.

The record shows that Reeves was arrested on an outstanding warrant from Acadia Parish at approximately 11:40 a.m. on November 13, 2001. He was placed in a holding cell at the Calcasieu Correction Center on suicide watch in a paper gown. When Detective Zaunbrecher went to see Reeves at 5:10 p.m. that day in order to obtain his consent to search his residence again, Reeves complained that he was cold. Reeves also complained that he had not been allowed to smoke a cigarette. By 5:40 p.m., the detective had relayed Reeves' complaint to higher authorities, who authorized the detective to give Reeves a blanket and to allow him to smoke a cigarette.[14]

The defendant claims that Detective Zaunbrecher's mentioning of these courtesies the next morning prior to further questioning was improperly coercive. Undoubtedly, Detective Zaunbrecher attempted to establish a rapport with the defendant by pointing out what she had done to help him be more comfortable.[15] We find nothing unduly coercive in that exchange.

Moreover, at trial, Detective Primeaux testified that he transported Reeves from the hospital, where Reeves voluntarily supplied physical evidence, back to the jail on November 13, 2001. According to Detective Primeaux, they arrived back at the correctional center at 4:25 p.m.[16] According to Detective Zaunbrecher, Reeves made

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[14] Vol. 14, p. 3397-3399.

[15] *See* 1st Supp. Vol. 1, p. 34.

[16] Vol. 39, p. 9567.

his complaints to her at 5:10 p.m.[17] She had obtained authority to resolve Reeves' complaints by 5:40 p.m., when she left the sheriff's office. Consequently, at the most, Reeves was uncomfortable for approximately an hour and a half. Nothing in the record supports the defendant's claim that temperature control or nicotine withdrawal were used as interrogation techniques. Instead, the record shows that officers, for the most part, tried to accommodate Reeves' requests whenever possible. *See Blank*, 2004-0204 p. 16-17, 955 So.2d at 107-108 ("...for the most part, officers accommodated defendant when possible, providing him drinks, allowing him to use the restroom and heating the interrogation room. ... and he was allowed to smoke before he confessed to any crimes.). This claim lacks merit.

E. Exhortations to Tell the Truth/Promises of Assistance

Reeves contends that the interrogators repeatedly used exhortations to tell the truth in an effort to secure a confession. In analyzing this factor, the district court ruled:

> A mild exhortation to tell the truth, or a remark that if the defendant cooperates the officer will "do what he can" or "things will go easier," does not negate the voluntary nature of the confession. ... Absolutely no promises were made to the defendant; reminding someone to let their conscience be their guide is not only not an improper influence, it is the right thing to do.[18]

The court of appeal agreed that, under the totality of the circumstances presented herein, there was no error with the trial court's conclusion that the defendant's statements were voluntary and not the product of coercion, threats, inducements, or promises.[19] The court of appeal specifically noted the defendant's testimony at the suppression hearing:

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[17] Vol. 39, p. 9573-9576

[18] Vol. 5, p. 1144 (citations omitted).

[19] Vol. 10, p. 2437.

> Defendant testified at the hearing on his motion to suppress that the detectives told him that he could help himself and make things right--they did not tell him how, but he understood it to mean that he could affect the outcome of his case. Yet, on cross-examination, he could not explain why the detectives' comments had bothered him. In fact, he admitted that the detectives' statements about helping himself did not influence him to talk, stating, "That had nothing to do with the statement."[20]

This court has previously held that "[s]tatements by police to a defendant that he would be better off if he cooperated are not 'promises or inducements designed to extract a confession.'" *State v. Robertson*, 1997-0177 p. 28 (La. 3/4/98), 712 So.2d 8, 31, *cert. denied*, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998), *citing State v. Lavalais*, 1995-0320 p. 7 (11/25/96), 685 So.2d 1048, 1053, *cert. denied*, 522 U.S. 825, 118 S.Ct. 85, 139 L.Ed.2d 42 (1997) ("Additionally, a confession is not rendered inadmissible by the fact law enforcement officers exhort or adjure an accused to tell the truth provided the exhortation is not accompanied by an inducement in the nature of a threat or one which implies a promise of reward.").

There is nothing in the record to suggest that Reeves was threatened or promised anything for his statement. All of the officers who participated in Reeves' interrogation denied either threatening him or promising him anything in exchange for his statements. In addition, as found by the court of appeal, Reeves testified at the suppression hearing that the detectives' exhortations that it was "time to tell the truth" "had nothing to do with the statement" which he ultimately made.[21] This claim has no merit.

F. Permission to Speak with his Mother

Reeves asserts that interrogators told him he would only be allowed to speak with his mother if he confessed to the crime. The defense contends that this was an

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[20] *Id.*

[21] 1st Supp. Vol. 1, p. 138.

unconstitutional inducement.

The basis for the defendant's contention appears to be a portion of Agent Dixon's suppression hearing testimony. The record shows that Agent Dixon testified that after M.J.T.'s body had been found, he entered the interview room with pictures of the crime scene. In addition to bluffing Reeves by stating that a fingerprint had been found which police could identify as his, Agent Dixon told Reeves that he needed to tell the truth. Agent Dixon told Reeves that the police were going to be able to make a case against him with evidence from the crime scene whether he cooperated or not.[22] Thereafter, the following testimony was adduced:

Dixon: At that point in time he said that he wanted to speak to his mother. I told him that I would call his mother. I asked him - - I said, "Do you promise to tell me the truth?" And he said he would tell me the truth. I then left the room to notify his mother.

Prosecutor: Then what happened?

Dixon: After we notified the mother, I came back in and told him that his mother had been contacted. He needed to get his business straight. And at that point in time he commenced to - - and, in fact, confessed to the fact that he had picked her up [the victim] and taken her out to the cemetery.[23]

At trial, Agent Dixon testified differently on the timing of Reeves' request and the agent's request that Reeves tell the truth. Agent Dixon's trial testimony was that he brought the photos of M.J.T.'s body and a picture of a fingerprint on a palmetto leaf into the interview room as a strategy to move Reeves from his position of denial.[24] After Reeves saw the pictures, Agent Dixon stated that Reeves' body language changed entirely, with Reeves hanging his head, looking toward the floor,

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[22] Vol. 14, p. 3419-3420.

[23] Vol. 14, p. 3420.

[24] Vol. 39, p. 9716.

and shaking his head in an up and down motion as if in affirmation.[25] Agent Dixon asked Reeves if he would now tell him the truth, and Reeves agreed that he would.[26] Agent Dixon testified he then told Reeves:

> I don't want you to tell me what I want to hear, I want you to tell me the truth." And he said, yes, he would. I said, "And you promise me you're going to tell me the truth?" And he said, "Yes." Then he asked to speak to his mother.[27]

Agent Dixon told Reeves:

> ...that talking to his mother wasn't going to do any good, but he had the right to talk to her. That talking to her was not going to change the facts of the case, whatever they - - what had already happened had happened. But that if he requested to talk to her, I'd attempt to go contact her.[28]

Agent Dixon left the interview room and asked that officers contact Reeves' mother. Once that was accomplished, and Agent Dixon made a few phone calls, he returned to the interview room where Detectives Zaunbrecher and Benovich were still questioning Reeves.[29]

Agent Dixon's trial testimony agrees with that of Detective Benovich at the suppression hearing. According to Detective Benovich, both he and Agent Dixon tried to keep Reeves talking after he asked to speak with his mother, but Reeves refused. On both direct examination and cross-examination, Detective Benovich insisted that Reeves was not questioned again until after he spoke with his mother.[30]

When Reeves testified at the suppression hearing, he did not indicate that his statement was induced by a promise to see his mother. Instead, the only thing he said

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[25] Vol. 39, p. 9717.

[26] Vol. 39, p. 9718.

[27] *Id.*

[28] *Id.*

[29] Vol. 39, p. 9718-9719.

[30] 1st Supp. Vol. 1, p. 11, 13, 16-17.

in connection with his mother was: "They stopped the tapes and said my mother was there to see me."[31]

Far from being an inducement to make a statement, the record shows the police were accommodating Reeves' request to speak with his mother, for the second time that day, before he confessed to having been with the victim.[32] *See Blank*, 2004-0204 p. 16-17, 955 So.2d at 107-108 ("...for the most part, officers accommodated defendant when possible, providing him drinks, allowing him to use the restroom and heating the interrogation room . . . and he was allowed to smoke before he confessed to any crimes.). The defense's characterization of this issue is not supported by the record. This issue has no merit.

2. Reopening the Motion to Suppress

The defendant's attempt to suppress the inculpatory statements he made during custodial interrogation were denied prior to the first trial. After his first trial, and prior to retrial, the defendant filed a motion to reopen the motion to suppress, claiming there were additional facts, disclosed during the first trial, and new law, which the originally-presiding judge had not been able to take into consideration in denying the suppression motion and in finding the defendant's inculpatory statements admissible.[33] Specifically, as far as additional facts, the defendant claims that defense testimony in his first trial shows he has cognitive defects which made the "fatigue factor" of his interrogation greater, in addition to major depression and post-traumatic stress disorder. The defense asserts these factors combined to make Reeves especially vulnerable to coercion during the officers' questioning. As far as new law,

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[31] 1st Supp. Vol. 1, p. 125.

[32] As already discussed, on November 14, 2001, Reeves met with his mother in the morning. *See* Vol. 39, p. 9577.

[33] *See* Vol. 17, p. 4020.

the defense contends that there are strong grounds to believe that the holding of the newly-decided *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) was violated during his interrogation.

The reopening of a suppression motion rests within the sound discretion of the trial court. *State v. Green*, 1994-0887 p. 18 n. 15 (La. 5/22/95), 655 So.2d 272, 284 n. 15. In *Manning*, 2003-1982 p. 26, 885 So.2d at 1074, this court held that "... low intellect, moderate mental retardation or diminished mental capacity does not *per se* and invariably vitiate capacity to make a free and voluntary statement or a knowing and intelligent *Miranda* waiver." Even assuming the truth of the defendant's contention as to his cognitive deficits, voluntariness is determined on a case by case basis, under a totality of the circumstances. *Id.*, 2003-1982 p. 26, 885 So.2d at 1075. Under the totality of the circumstances presented here, there was no abuse of the trial court's discretion in denying the motion to reopen the suppression hearing with regard to the defendant's claim that his alleged cognitive deficits enhanced his fatigue during questioning. As previously noted, the defendant did not make inculpatory statements during the initial intensive questioning; inculpatory statements were made only after a period of sleep, food and two visits with his mother.

Nor do we find an abuse of discretion in the trial court's denial of the motion to reopen the suppression hearing on the ground of new law. In *Seibert*, *supra*, the Supreme Court denounced a police interrogation tactic of "question first, *Mirandize* later" in which officers initially questioned a suspect without informing the suspect of his or her constitutional rights. After a confession was obtained, the officers would take a break. After the officers returned for additional questioning, only *then* would they advise the suspect of his or her rights under *Miranda* and obtain a signed waiver of those rights. As we discussed in *Leger*, 2005-0011 p. 28, 936 So.2d at 133, "[t]he

Court found that a midstream recitation of *Miranda* warnings could not comply with the object of *Miranda*, *i.e.*, that the 'warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture.'"[34] *Seibert* cautioned:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.[35]

In the present case, the record shows that the circumstances presented here are factually distinguishable from those in *Seibert*. Here, Reeves was *Mirandized* before he left his house, immediately prior to questioning, as well as several times throughout the interrogation process. He also signed rights forms to formally waive his constitutional rights throughout the interrogation. There was no *Miranda* violation in this case and no abuse of the trial court's discretion in denying the motion to reopen the motion to suppress.

Assignments of Error 57-59
Legality of Initial Detention

The defendant contends that Reeves' inculpatory statement while in police custody was the fruit of an illegal arrest. Reeves argues that he was effectively in custody from the time he began to drive to the station escorted by two patrol cars. Alternatively, Reeves asserts he was under arrest from the time the polygraph occurred, and not the next day when he was formally arrested on an outstanding warrant. Reeves contends that, regardless of exactly when he was placed under arrest, interrogation was initiated prior to a time when the officers believed they had probable cause for his arrest. Finally, Reeves contends that when he was ultimately formally arrested on an outstanding warrant, the warrant was facially invalid.

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[34] *See Seibert*, 542 U.S. at 612, 124 S.Ct. at 2610.

[35] *Seibert*, 542 U.S. at 613, 124 S.Ct. at 2611.

With regard to statements as fruit of an illegal arrest, this court has previously held, in *State v. Fisher*, 1997-1133 p. 11 (La. 9/9/98), 720 So.2d 1179, 1185:

> Statements given during a period of illegal detention are inadmissible, even though voluntarily given, if they are the product of illegal detention and not the result of an independent act of free will. *Florida v. Royer*, 460 U.S. 491, 501, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).
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> The fact that the accused would not have made a statement "but for" the illegal arrest does not alone establish a causal link sufficient to require exclusion of the statement. *Brown*, 422 U.S. at 602-03, 95 S.Ct. 2254. On the other hand, the fact that an accused may have been properly informed of his constitutional rights and waived them, while relevant, does not alone break the causal link. *Taylor [v Alabama]*, 457 U.S. [687]at 690, 102 S.Ct. 2664[, 73 L.Ed.2d 314 (1982)]; *Brown*, 422 U.S. at 601, 603, 95 S.Ct. 2254 (holding Miranda warnings are not a "talisman"). Other factors in assessing the link between the illegal arrest and the statements are the existence of intervening circumstances, the "temporal proximity" of the arrest and the statements, and the "purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 604, 95 S.Ct. 2254. See also *Taylor*, 457 U.S. at 690-91, 102 S.Ct. 2664; *Dunaway v. New York*, 442 U.S. 200, 218-19, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

Before we answer the question of whether the statements must be suppressed, we must first determine whether Reeves' initial detention was illegal. The trial court ruled as follows on the issue of illegal initial detention:

> The record of these proceedings amply demonstrates that the defendant voluntarily accompanied the police to the station during their investigation. He was repeatedly advised of his constitutional rights, repeatedly indicated he understood them, and repeatedly waived them. He was well-treated by the officers and was never led to believe he was not free to leave. A valid warrant for his arrest was discovered and executed on November 13, 2001. This allegation has no merit.[36]

Prior to trial, the defendant sought a writ of review of this ruling, contending he had been under arrest either when he drove to the CPSO in the company of the officers or before the polygraph test which began at 11:30 p.m. on November 12, 2001. The court of appeal held that Reeves voluntarily agreed to go to the CPSO and

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[36] Vol. 5, p. 1145.

was informed of his constitutional rights. Reeves waived those rights on a written form prior to the polygraph examination and consented to taking the test. The court of appeal concluded, based on specific uncontested facts of the circumstances of the interrogation, that the defendant was under arrest after his polygraph examination at 1:20 a.m. on November 13, 2001, rather than the two earlier times as argued by the defendant. Thus, the court of appeal determined that Reeves was actually under arrest and "in custody" prior to his formal arrest on the outstanding warrant which occurred later in the morning of November 13, 2001. Specifically, the court of appeal found:

> Having considered the testimony of the witnesses and Defendant and the videotape of the walk-through of the CPSO, we find that a reasonable person in Defendant's situation--having taken a polygraph test and being told or overhearing that he failed the test; hearing himself described as the one the police were looking for; led by officers through a code-locked door in to the detectives' "bullpen," then into a separate interview room where he was interrogated; and being escorted to and from the restroom--would not feel that he was free to leave. Accordingly, we conclude Defendant was under arrest *after* his polygraph examination at 1:20 a.m. November 13, rather than 11:30 p.m. November 12 as he contends.[37] (Emphasis in original).

Reeves contends on appeal that his statements made to officers at the CPSO were fruits of an illegal detention. In order to evaluate the merit of the issue, we must review the record to determine the point at which Reeves was "in custody" and whether the initial detention was illegal. Determining at what point Reeves was "in custody" is decided by two distinct inquiries:

> . . . an objective assessment of the circumstances surrounding the interrogation to determine whether there is a formal arrest or restraint on freedom of the degree associated with formal arrest; and, second, an evaluation of how a reasonable person in the position of the interviewee would gauge the breadth of his freedom of action.[38]

We note that the record overwhelmingly supports the conclusion that the

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[37] Vol. 10, p. 2442-2443.

[38] *Blank*, 2004-0204 p. 8, 955 So.2d at 102.

defendant voluntarily delivered himself to the CPSO and agreed to submit to a polygraph test. According to Deputy Pierotti's trial testimony, the defendant told officers he did not know how to get to the CPSO and had to follow the officers there.[39] His videotaped statement confirms that he was following officers to the station. He was advised of his constitutional rights both before he left his house, and immediately prior to taking the polygraph examination. Consequently, we reject, as unsupported, the defendant's current contention that he was effectively in custody from the time he began to drive himself to the station. Likewise, we reject the defendant's alternative contention that he was under arrest at the station prior to the time the polygraph examination was administered.

However, we, like the court of appeal, find that the circumstances of Reeves' interrogation lead us to conclude that Reeves was effectively in custody after the polygraph examination was completed. From that point on, he was held in an area which needed a key code to enter. Although officers testified that there was no requirement of a code in order to leave, that fact was not conveyed to Reeves. In addition, Reeves was accompanied by someone when he used the restroom or smoked. An objective assessment of the circumstances, and an evaluation of what a reasonable person would believe, if faced with those circumstances, lead us to the conclusion that Reeves was effectively in custody after the polygraph test was performed.

We also agree with the court of appeal that probable cause to arrest the defendant existed after he participated in, and failed, the polygraph examination. This court has previously held that "probable cause to arrest exists when the facts and circumstances known to the arresting officer, and of which he has reasonable and

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[39] Vol. 38, p. 9403.

trustworthy information, are sufficient to justify a man of ordinary caution in the belief that the accused has committed an offense." *State v. Parker*, 2006-0053 p. 2 (La. 6/16/06), 931 So.2d 353, 355; *State v. Ceasar*, 2002-3021 p. 6 (La.10/21/03), 859 So.2d 639, 644. The officers' subjective belief as to whether probable cause exists is not determinative, "but turns on a completely objective evaluation of *all* of [the] circumstances known to the officer[s] at the time of [their] challenged action." *State v. Landry*, 1998-0188 p. 2 (La. 1/20/99), 729 So.2d 1019, 1020 (emphasis in original).

As found by the court of appeal, the following facts were known to the CPSO after Reeves submitted to the polygraph test:

> ... a four-year-old girl was missing from the trailer park where she lived; shortly before she was missed, a white male driving Defendant's car had been to an elementary school asking for girls who did not attend the school; just before the little girl was missed, a white male driving a car matching the description of Defendant's car was seen driving in the trailer park where she lived; the elementary school and the trailer park were in close proximity to each other; these events occurred within a relatively short period of time; Defendant had been convicted of sexual crimes involving minors; and he failed a polygraph test concerning his knowledge of the little girl and her whereabouts. We find that based on the totality of this information it was reasonable for the CPSO to believe that Defendant had committed a crime involving the little girl.[40]

We add to this analysis, with which we agree, the facts that the defendant told officers at his house that he was home from work at 4 p.m., well before his mother said he was home, between 5-5:30 p.m.

Finding probable cause to arrest the defendant after he failed the polygraph examination, we simultaneously answer in the negative both the questions whether the detention was illegal and whether the validity or invalidity of the outstanding warrant upon which the defendant was formally arrested later that morning is important to this analysis. The statements given by Reeves at the CPSO were not

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[40] Vol. 10, p. 2444-2445.

obtained during a period of illegal detention and, thus, may not be held to be inadmissible on that ground. Reeves signed several rights forms throughout his detention, acknowledging that he had been informed of his constitutional rights and waiving them.[41] Further, our finding that probable cause to arrest Reeves existed after the polygraph test renders immaterial the validity or invalidity of the outstanding warrant upon which Reeves was formally arrested.[42] These issues have no merit.[43]

Assignment of Error 60
Denial of Motion to Suppress Evidence

Reeves asserts he was held in custody at least from 1:10 a.m. on November 13, 2001. Prior to his formal arrest at 11:40 a.m. that morning, physical evidence in the form of DNA and physical trace evidence was seized from his person without a warrant. Reeves filed a motion to suppress all physical evidence, including DNA and physical trace evidence, seized from his person, which was denied by the trial court.[44] The defendant claims the trial court erred in denying his suppression motion.

A search conducted without a warrant issued upon probable cause is *per se* unreasonable subject only to a few specifically established and well-delineated exceptions. *Leger*, 2005-0011 p. 64, 936 So.2d at 154. Consent is a well-recognized exception to the warrant requirement. *State v. Strange*, 2004-0273 p. 6 (La. 5/14/04),

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[41] The record shows that Reeves signed *Miranda* forms at 10:45 p.m. on November 12, 2001, S-15; at 3:08 a.m. on November 13, 2001, S-26; at 11:05 a.m. on November 14, 2001, S-27 and at 8:16 p.m. on November 14, 2001 and at 12:35 a.m. on November 15, 2001, S-56.

[42] Moreover, the exhibit to which the defendant refers in brief in support of his argument is actually a photograph of the victim's pants.

[43] In a footnote, the defense argues that the time when Reeves was in custody is relevant to the question of whether the police were required to bring him before a neutral magistrate at some point prior to securing a confession. The defense claims that the confession was secured after forty-eight but less than seventy-two hours after he was brought into custody, and acknowledges that, even assuming its characterization of the time period is factually correct, the officers' actions were in technical compliance with the statutory provisions of La. C.Cr.P. art. 230.1. Appellant's brief, p. 72, n. 115. In spite of this acknowledgment of statutory compliance, the defense claims the delay in bringing Reeves before a neutral magistrate was arguably unconstitutional. We find neither a violation of the statutory rules nor a violation of constitutional protections.

[44] *See* Vol. 1, p. 615; 1st Supp. Vol. 2, p. 450.

876 So.2d 39, 42; *State v. Owen*, 453 So.2d 1202, 1206 (La.1984); *State v. Packard*, 389 So.2d 56, 58 (La.1980), *cert. denied*, 450 U.S. 928, 101 S.Ct. 1385, 67 L.Ed.2d 359 (1981).

The record shows that Reeves consented to give the authorities samples of his DNA and physical trace evidence.[45] Nothing in the record supports a conclusion that this consent was involuntarily obtained. Rather, the officer before whom Reeves signed the consent form and the nurse who extracted the samples testified that the defendant freely signed the consent forms.[46] Insofar as Reeves incorporates his prior argument, that his initial detention was illegal, and asserts this physical evidence was thus illegally obtained, we reiterate our conclusion, based upon the circumstances of this case, that the police had probable cause to arrest Reeves at the time the consent forms were signed and the physical evidence samples were obtained. Consequently, Reeves' consent was not secured through the means of an unlawful arrest. The trial judge did not abuse its discretion in denying the defendant's motion to suppress evidence. *See Leger*, 2005-0011 p. 10, 936 So.2d at 122; *Blank*, 2004-0204 p. 10, 955 So.2d at 103. This issue has no merit.

Assignment of Error 61
Denial of Motion to Quash

Prior to trial, the defendant filed a motion to quash the indictment for a variety of reasons, including the argument that a "death-qualified" jury deprived him of an impartial jury.[47] After hearing argument, the trial court denied the motion to quash.[48]

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[45] *See* S-16 ("Voluntary Consent to Submission of Photographing, Fingerprinting, or Taking of Bodily Substances" form); and S-17 (Sexual Assault Evidence Collection Kit containing copy of consent form signed by Reeves in the presence of Nurse Tammy Bailey) (not part of the record sent up on appeal but referred to in record).

[46] Vol. 38, p. 9444-9446; Vol. 39, p. 9547-9549.

[47] Vol. 3, p. 595-602.

[48] Vol. 13, p. 3163.

On appeal, the defense asserts that the court should reconsider the framework for capital jury selection laid out in *Witherspoon v. Illinois*, *Wainwright v. Witt*, and *Lockhart v. McCree*. Reeves argues that a prospective juror should not be challenged based upon his views on the death penalty.

This court has previously held:

> Removal for cause is grounded in constitutional principles of assuring a fair trial, unlike peremptory challenges, which are grounded in statutory law. *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). Therefore, even when the state has not exhausted its peremptory challenges, removal of a scrupled but otherwise eligible venireman constitutes reversible error. Removal for cause is limited by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), which makes clear that a state infringes on a capital defendant's sixth and fourteenth amendment rights to a fair and impartial jury when it removes for cause all veniremen expressing conscientious objections to capital punishment. *Wainwright v. Witt*, 469 U.S. 412, 416, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Those firmly believing that capital punishment is unjust "may nevertheless serve as jurors in a capital case so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). The standard used in determining whether a prospective juror may be removed for cause is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424, 105 S.Ct. 844; *State v. Roy*, 95-0638 (La.10/4/96), 681 So.2d 1230, 1234, *cert. denied*, *Roy v. La.*, 520 U.S. 1188, 117 S.Ct. 1474, 137 L.Ed.2d 686 (1997).

State v. Edwards, 1997-1797 p. 15-16 (La. 7/2/99), 750 So.2d 893, 904, *cert. denied*, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999).

La. C.Cr.P. art. 798(2) incorporated the standards of *Witherspoon*, *Wainwright v. Witt*, and *Lockhart*. *See State v. Jones*, 2003-3542 p. 11 n. 14 (La. 10/19/04), 884 So.2d 582, 589 n. 14; *State v. Mitchell*, 1994-2078 p. 4 (La.5/21/96), 674 So.2d 250, 254, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996). Under La. C.Cr.P. art. 798(2), a juror is excused in a capital case when the tendered juror:

> has conscientious scruples against the infliction of capital punishment and makes it known:

(a) That he would automatically vote against the imposition of capital punishment....

(b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath; or

(c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt.

The defendant presents nothing which would cause the court to reevaluate or reconsider the standards enunciated in the Supreme Court jurisprudence or the statutory criminal procedure currently existing. This argument has previously been addressed, and rejected, by this court. *See State v. Lindsey*, 543 So.2d 886, 896 (La. 1989), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 798 (1990) ("There is also no merit to defendant's argument that, if potential jurors are excluded under *Witherspoon* challenges, the resultant jury lacks impartiality and is more conviction-prone. This argument was addressed and rejected by the U.S. Supreme Court in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)."). This issue has no merit.

Assignment of Error 62
Denial of Motion to Recuse

When Reeves was fourteen years old, he was the victim of sexual abuse perpetrated upon him by a neighbor, George Reed. Assistant District Attorney Wayne Frey prosecuted Reed, obtaining a guilty plea to the crime of aggravated crime against nature, for which Reed was sentenced to five years imprisonment. The defense introduced this evidence in the penalty phase of the instant trial. Frey participated in Reeves' trial as one of the prosecutors.

Prior to trial, the defense filed a motion to recuse the District Attorney's Office,

and Frey in particular, from prosecuting Reeves.[49] The recusal motion asserted that the recusal of the District Attorney was required by law. Additionally, the motion argued that the continued participation of the District Attorney and Frey, in particular, would interfere with Reeves' rights to call witnesses and to testify, and would present the appearance of impropriety.[50]

At a hearing on the motion held on January 14, 2003, District Attorney Rick Bryant informed the court that Frey was participating in this prosecution as the third-chair prosecutor.[51] A stipulation was agreed to by the defense and the state that District Attorney Bryant, who was prosecuting this case, may have listened to Frey's advice, but that Bryant was the person making the decisions for the state.[52]

Frey testified he had no independent recollection of the *Reed* case, which was prosecuted in 1989.[53] Frey had no independent recollection of ever having spoken to Reeves as the victim in that case, and the *Reed* record did not indicate whether any communication, in fact, occurred, as the information about the crime was contained in a written statement the police obtained from Reeves.[54] Frey informed the court that a plea bargain was reached in the *Reed* case; thus, no trial occurred.[55] Frey acknowledged that a plea bargain was reached with Reed because Frey thought there was insufficient evidence to corroborate and prove beyond a reasonable doubt the

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[49] *See* Vol. 5, p. 1247-1250; Vol. 6, p. 1252.

[50] *Id.*

[51] 1st Supp. Vol. 3, p. 670. The District Attorney was lead counsel in the trial, with Assistant District Attorney Cynthia Killingsworth acting as second-chair. The record shows that she handled most of the pretrial stages of the prosecution.

[52] *Id.*

[53] *Id.*

[54] *Id.*, p. 675-676.

[55] *Id.*, p. 676.

initial charge of forcible rape.[56]

After hearing Frey's testimony and the argument of counsel, the trial court denied the motion to recuse the District Attorney's office and Assistant District Attorney Frey from the prosecution. After consulting La. C.Cr.P. art. 680 regarding recusal of a district attorney, the trial judge found there was no legal reason which would require recusal. In oral reasons for judgment, then-presiding Judge Minaldi found that the District Attorney's Office does not represent the victims in the cases the office prosecutes. "They may have interests aligned at times with the victim in that case, but they do not represent the victim, they represent the State of Louisiana."[57] Judge Minaldi found that Reeves was not a former client of the District Attorney's office, but a state witness in the prosecution of the *Reed* case. The judge stated:

> The only possible relationship with Mr. Frey's former involvement in a case where Mr. Reeves was a victim is because the Defense intends to use that as part of its mitigation in the penalty phase.
>
> Now, that in my opinion does not make it a substantially related matter. It makes it a related matter, but it is not substantially related to the cause and the facts that are involved in this particular case.
>
> Furthermore, as has been indicated throughout this hearing Mr. Frey has apparently no independent recollection of these facts. Anything that he testifies to or would testify to in the trial of this matter would be hearsay.
>
> He would just be helping you introduce documents which are introducible on their own, admissible on their own. There is no testimony that you could elicit from Mr. Frey which would not be hearsay.
>
> And all of the documents reflect exactly what he could testify to and admissible without his testimony. In addition, there are other witnesses who are available to testify to the same documents besides Mr. Frey, who don't even work for the District Attorney's Office.

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[56] *Id.*, p. 676-677.

[57] *Id.*, p. 689.

Any knowledge obtained by Mr. Frey that is contained in the District Attorney's file would have been discoverable by the District Attorney's Office whether they prosecuted this case or not.

So they are not given any particular advantage because they had this file in their own possession. If this had happened in Jeff Davis Parish they would have all this same information any way.

There has been absolutely no showing that there was any - - and I don't even really think that this is relevant to this inquiry because Mr. Reeves was not a former client.

But there has been absolutely no indication to me there there was any kind of professional trust or any relationship between the two that occurred because of Mr. Reeves' involvement as a victim in this case, and nothing confidential has been - - that was in your motion - - and there has been nothing indicated to me that would have been of a confidential nature either in the District Attorney's file or through Mr. Frey's testimony.

And that goes to your allegation of the appearance of impropriety. So - -

...

Motion is denied.[58]

La. C.Cr.P. art. 680 provides the grounds for recusation of a district attorney, as follows:

Art. 680. Grounds for recusation of district attorney

A district attorney shall be recused when he:

(1) Has a personal interest in the cause or grand jury proceeding which is in conflict with fair and impartial administration of justice;

(2) Is related to the party accused or to the party injured, or to the spouse of the accused or party injured, or to a party who is a focus of a grand jury investigation, to such an extent that it may appreciably influence him in the performance of the duties of his office; or

(3) Has been employed or consulted in the case as attorney for the defendant before his election or appointment as district attorney.

It should be noted the proper procedural vehicle in which to request removal of an assistant district attorney from prosecuting a case is a motion to disqualify.

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[58] 1st Supp. Vol. 3, p. 690-692.

Recusation is a proceeding which is not applicable to an assistant district attorney. La.C.Cr.P. art. 680, Comment (a);[59] *State v. Bourque*, 622 So.2d 198, 215 n.4 (La. 1993), *overruled in part on other grounds*, *State v. Comeaux*, 1993-2729 (La. 7/1/97), 699 So.2d 16, *cert. denied*, 522 U.S. 1150, 118 S.Ct. 1169, 140 L.Ed.2d 179 (1998); *State v. Fallon*, 290 So.2d 273, 279 (La.1974).

In a motion to recuse the district attorney, "the defendant bears the burden of showing by a preponderance of the evidence that the district attorney has a personal interest in conflict with the fair and impartial administration of justice." *State v. Edwards*, 420 So.2d 663, 673 (La.1982); *see Bourque*, 622 So.2d at 216-217. While this standard of proof is also applicable for the disqualification of an assistant district attorney, the grounds for disqualification are not necessarily restricted to the statutory grounds to recuse a district attorney as set forth in La.C.Cr.P. art. 680. *See State v. Allen*, 539 So.2d 1232, 1234 (La.1989).

A review of the recusal motion, the testimony adduced at the hearing on the motion, and the arguments of counsel show that, although the recusal motion is directed, in part, against the "Office of the District Attorney" and unnamed "representatives of the Office of the District Attorney," the defense had no ground upon which to base its argument against District Attorney Bryant or the District Attorney's office in general. Clearly, the defendant failed to meet his burden of showing by a preponderance of the evidence that there were grounds for recusal of the District Attorney, or his office in general, in this case and there is no error in the

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[59] La. C.Cr.P. art. 680, Official Revision Comment (a) provides:

> Arts. 8 and 934(5) provide that district attorney includes assistant district attorney except where the context clearly indicates otherwise. The recusation procedures clearly contemplate recusation of the district attorney himself and the appointment of a district attorney ad hoc by the judge. When an assistant district attorney becomes unavailable, for whatever cause, the district attorney appoints the substitute if one is needed. Recusation is a proceeding which is by the nature of the procedures followed, not applicable to the assistant district attorney.

trial court's ruling in this regard.

With regard to Assistant District Attorney Frey, the defense argued that Frey should be disqualified as a prosecutor due to his involvement as prosecutor in the *Reed* case. The defense claimed that Frey represented the interests of Reeves in a prior proceeding with a substantial relationship to the instant matter; that Frey obtained confidential information about Reeves in the prior proceeding which would impact Reeves' right to testify in his own defense; and that the continued participation of Frey would create an appearance of impropriety for those reasons.

This court has previously held that, when a defendant seeks to recuse a district attorney, or to disqualify an assistant district attorney, the ethical rules and jurisprudence governing attorney conduct "impose a broader gloss on the statutory requirement by providing for recusation [or disqualification] when the district attorney [or assistant district attorney] was previously employed in 'a substantially related matter.'" *Allen*, 539 So.2d at 1234. Under the recusal article and the ethical rules, the question becomes whether the previous matter for which the attorney was employed is substantially related to the criminal proceeding. *Id.* If the previous matter is found to be substantially related, "[t]he courts may then infer the receipt of confidences violatable by the subsequent representation." *Allen*, 539 So.2d at 1235, *quoting Brasseaux v. Girouard*, 214 So.2d 401 (La. App. 3rd Cir. 1968), *writ refused*, 253 La. 60, 216 So.2d 307 (La. 1968).

The record does not support Reeves' contentions. The trial court correctly determined that Frey was not Reeves' legal representative in the prosecution of Reed, and Reeves was not Frey's client, even though the interests of the state and the interests of the victim in that former prosecution may have been aligned. Rather, "[a] prosecutor stands as the representative of the people of the State of Louisiana. He is

entrusted with upholding the integrity of the criminal justice system by ensuring that justice is served for both the victims of crimes and the accused." *In re: Jordan*, 2004-2397 p. 9 (La. 6/29/05), 913 So.2d 775, 781. Although the trial court found that there was a relationship between the two proceedings, based on the defense's decision to present evidence of Reeves' sexual abuse as a child in the penalty phase, the trial court specifically found that Frey did not need to be available as a witness in order to present that evidence. *Compare Allen*, 539 So.2d at 1235 (The defendant's former attorney, now an assistant district attorney "would have been the best candidate for a witness to explain and testify as to the significance of the bankruptcy, discharge, and abandonment," a key component of the defense.). Not only could the documents and information from the prior proceeding be introduced by means other than Frey's testimony, Frey testified he did not have an independent recollection of the circumstances of the *Reed* case. Because Frey could not add any information other than what was already available to the state through the record of the *Reed* case, the fact that Frey prosecuted Reed could have no impact on Reeves' decision whether or not to testify. *Compare Allen*, 539 So.2d at 1235 (where the defendant "could assume neither the risk of taking the stand and submitting to cross-examination by his former lawyer nor the risk of placing a potentially hostile witness on the stand to testify in his behalf"). There is no appearance of impropriety created when the state prosecutes a person charged with crime who may, in the past, have been a victim of crime himself. The defense failed to bear its burden of proving, by a preponderance of the evidence, that Frey be disqualified from participation in this trial as an assistant district attorney. The trial judge did not err in denying the defendant's motion seeking his removal from the prosecution team. This issue has no merit.

VOIR DIRE ISSUES

Assignments of Error 18-45
Jury Selection

By these assignments of error, the defendant challenges several rulings by the trial court pertaining to voir dire. The various topics raised are: (1) whether the trial court erroneously failed to grant defense challenges for cause on prospective jurors who could not consider certain mitigating circumstances; (2) whether the trial court erred in refusing to grant defense challenges for cause on prospective jurors who would automatically vote for the death penalty, or who were so "pro-death" as to be substantially impaired; (3) whether the trial court erroneously granted state challenges for cause on prospective jurors who could consider imposing the death penalty; (4) whether the trial court improperly favored the state in his rulings and conduct throughout voir dire in violation of the defendant's right to an impartial jury; (5) whether the trial court erroneously curtailed the voir dire of defense counsel; (6) whether the trial court erred in refusing to grant a mistrial or challenges for cause based upon the tainting of prospective jurors; and (7) whether the trial court erred in failing to find that the defense established a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

1-3. Cause Challenges

La. Const. art. 1, § 17 guarantees that "[t]he accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law." La.C.Cr.P. art. 799 provides the defendant in a capital case with twelve peremptory challenges. "Therefore, when a defendant uses all of his peremptory challenges, a trial court's erroneous ruling [on a cause challenge] depriving him of one of his peremptory challenges constitutes a substantial violation of his constitutional and statutory rights, requiring reversal of

the conviction and sentence." *State v. Cross*, 1993-1189 p. 7 (La.6/30/95), 658 So.2d 683, 686. Prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant exhausts his peremptory challenges. *State v. Robertson*, 1992-2660 p. 3 (La. 1/14/94), 630 So.2d 1278, 1280; *State v. Ross*, 623 So.2d 643, 644 (La.1993).

However, as recent decisions of this court have emphasized, an erroneous ruling on a challenge for cause which does not deprive a defendant of one of his peremptory challenges does not provide grounds for reversing his conviction and sentence. A defendant thus must use one of his remaining peremptory challenges curatively to remove the juror or waive the complaint on appeal, even in a case in which he ultimately exhausts his peremptory challenges. *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal.")(citing *State v. Connolly*, 1996-1680, p. 8 (La. 7/1/97), 700 So.2d 810, 818; *Bourque*, 622 So.2d at 229-30; *Fallon*, 290 So.2d at 282.

The grounds for which a juror may be challenged for cause are set forth in La.C.Cr.P. art. 797, which sets forth in pertinent part:

> **Art. 797. Challenge for cause**
>
> The state or the defendant may challenge a juror for cause on the ground that:
>
> * * *
>
> (2) The juror is not impartial, whatever the cause of his impartiality....
>
> * * *
>
> (4) The juror will not accept the law as given to him by the court...

The defendant asserts that the trial court failed to grant defense challenges for cause on the basis of the views regarding capital punishment of certain prospective jurors. Additionally, the defendant contends that state challenges for cause were improperly granted. In this case, the defendant exhausted all 12 of his peremptory challenges.[60]

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Manning*, 2003-1982 p. 38, 885 So.2d at 1082. *Witt* clarified the earlier Supreme Court pronouncement in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), that a prospective juror who would vote automatically for a life sentence was properly excluded by the trial court. La. C.Cr.P. art. 798(2)(a) and (b) incorporate the standard of *Witherspoon*, as clarified by *Witt*, and provide:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that
>
> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known:
>
> > (a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him;
> >
> > (b) That his attitude toward the death penalty would prevent or substantially impair him from making an

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[60] The defense exercised its 12 peremptory challenges on the following prospective jurors: (1) David Blanchard, Vol. 43, p. 8429; (2) Thomas Vasta, Vol. 34, p. 8429; (3) Patricia Bonnette, Vol. 34, p. 8430; (4) Deborah Gibbens, Vol. 34, p. 8431; (5) Michael Schafer, Vol. 35, p. 8673; (6) Bradford Miller, Vol. 35, p. 8673; (7) Marilyn Woodfork, Vol. 35, p. 8674; (8) Kimberly Jones, Vol. 35, p. 8677; (9) Ronnie Todd, Vol. 37, p. 9009; (10) Daniel Norton, Vol. 37, p. 9011; (11) John Frederickson, Vol. 37, p. 9012; (12) Barbara Linder, Vol. 37, p. 9014. The defense also used peremptory challenges to remove the following prospective jurors as alternate jurors: Larry Davis, Vol. 37, p. 9022-23; Doris Butler, Vol. 37, p. 9129.

> impartial decision as a juror in accordance with his instructions and his oath; ...

In a "reverse-*Witherspoon* " situation, the basis of the exclusion is that a prospective juror "will not consider a life sentence and ... will automatically vote for the death penalty under the factual circumstances of the case before him ...". *Robertson*, 1992-2660 p. 8, 630 So.2d at 1284. The "substantial impaitment" standard applies equally to "reverse-*Witherspoon* " challenges. *Manning*, 2003-1982 p. 38 n. 22, 885 So.2d at 1083 n. 22. Thus, if a potential juror's views on the death penalty are such that they would prevent or substantially impair the performance of his duties in accordance with his instructions or oaths, whether those views are for or against the death penalty, he should be excused for cause.

In reviewing the trial court's rulings on cause challenges, we note that a trial court is vested with broad discretion in making these determinations, and the trial court's rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *Cross*, 1993-1189 at p. 7, 658 So.2d at 686; *Robertson*, 1992-2660 at p. 4, 630 So.2d at 1281. Even so, this court has cautioned that a venireman's responses cannot be considered in isolation and that a challenge should be granted,"even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably [inferred]." *State v. Jones*, 474 So.2d 919, 929 (La. 1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 992 (1986). Yet, a refusal to disqualify a venireman on grounds he is biased does not constitute reversible error or an abuse of discretion if, after further examination or rehabilitation, the juror demonstrates a willingness and ability to decide the case fairly according to the law and evidence. *State v. Howard*, 1998-0064 p.7-10 (La. 4/23/99), 751 So.2d 783, 795-97, *cert. denied*, 528 U.S. 974, 120 S.Ct.

420, 145 L.Ed.2d 328 (1999); *Robertson*, 630 So.2d at 1281.

1. Cause Challenges - Mitigating Circumstances

La. C. Cr.P. art. 905.5 enumerates mitigating circumstances which "shall be considered" by a juror in deciding whether to impose a sentence of death:

> **Art. 905.5. Mitigating circumstances**
>
> The following shall be considered mitigating circumstances:
>
> (a) The offender has no significant prior history of criminal activity;
>
> (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
>
> (c) The offense was committed while the offender was under the influence or under the domination of another person;
>
> (d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
>
> (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
>
> (f) The youth of the offender at the time of the offense;
>
> (g) The offender was a principal whose participation was relatively minor;
>
> (h) Any other relevant mitigating circumstance.

Section (h) is often described as a "non-statutory" circumstance because this factor is not specifically described in the statute, but can encompass any circumstance which an individual juror may find relevant and mitigating.

Before determining the merit of the defendant's claims regarding individual prospective jurors, we address a related argument raised by the defendant as a preliminary issue with regard to this claim. The defendant asserts that in the early stages of voir dire, the trial court and the prosecutor incorrectly informed prospective

jurors that there was no need to consider non-statutory mitigating factors.

This court has previously held in *Robertson*, 1997-0177 p. 22, 712 So.2d at 27:

> A misstatement of law by the prosecutor does not prejudice a defendant if the judge subsequently admonishes or correctly instructs the jury. [*State v.*] *Roy*, [19]95-0638 at p. 14-15 [(La. 10/4/96)], 681 So.2d [1230,] at 1239-40. Similarly, a trial court's misstatement of the law during voir dire examination does not require reversal of a defendant's conviction if the court properly charges the jury at the close of the case. *State v. Cavazos*, 610 So.2d 127, 128 (La. 1992).

The record in this case shows that the trial judge promptly noted his error during voir dire and corrected it. After the trial judge sustained a state objection to a defense question to a prospective juror regarding mitigation, and before the next panel was questioned, the trial judge reconsidered his ruling. Viewing the issue as impacting the defendant's right to full voir dire, the trial judge informed the defense of the manner in which he thought the issue should be addressed with future panels and held that the prospective jurors who had been misinformed of the law, remaining in the previous panel after other cause challenges were made and granted, would be called back and the defense would be provided with an additional opportunity to question them.[61]

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[61] The trial judge stated:

> Also, I want the - - actually I'm reconsidering a decision that I made yesterday. The Court - - I was reviewing the defendant's - - what they consider the right to full voir dire. I had restricted your ability to ask open-ended questions as to mitigation. The Court's reviewed *State v. Hall*, 616 So.2d 664. In reviewing the decision, the purpose of voir dire examination is to determine qualification of prospective jurors by testing their competency and their impartiality. It was apparent that many of the jurors - - to the Court that many of the potential jurors, the concepts of aggravation and mitigation were somewhat foreign and new to each of them. The Court had previously indicated that the defendant would not be allowed to ask open-ended questions as to what would consider mitigating circumstances. The Court is going to vacate that ruling of sustaining the objection by the State, will qualify it, and would ask - - that you will be able to ask that question but only if a foundation is laid to some extent that mitigation is something that they should consider, some examples of mitigation contained in Code of Criminal Procedure 905.5, or then you may ask the open-ended question in order to lay that foundation to get a feel whether they are competent and understand the concept of mitigation. Therefore it would fall within those purviews. The five jurors that were remaining will be allowed to be requestioned on that area of mitigation when they are brought back in under the other voir dire, if the Defense so desires. *See* Vol. 22, p. 5459-60.

The record shows that six prospective jurors remaining from the initial *Witherspoon* evaluation were asked to return for further questioning, five of which were called back on the question of whether they properly understood the law regarding the consideration of mitigating circumstances. At that time, the trial judge indicated for the record why these prospective jurors had been called back,[62] re-instructed them as to the law regarding their consideration of mitigating circumstances,[63] and re-evaluated the defense's cause challenges as to these jurors in light of the court's clarification.[64] The record shows the trial judge properly

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[62] At that time, the trial judge stated:

> All right. At this point, the Court had requested that six of the jurors of which have been previously questioned were returned, based on the Court's review of some additional case law. It is noted that all six of the jurors that have been asked to return were challenged by the Defense for cause at some point, and that challenge was denied, and the reasons are for the record.
>
> ...[the six prospective jurors are identified] ... That was in Panel 2 of the initial *Witherspoon* evaluation. They were not questioned with regard to inconsistencies given to statute - - basically inconsistencies to accepting or seriously considering mitigating circumstances.
>
> At that time, the Court made a ruling, that since - - they would be accepted, since their decisions were not to review non-statutory - - or consider non-statutory mitigating circumstances. the Court has since vacated that and indicated it will ask them, feeling that all mitigating circumstances should be considered, based on the Court's application of the law. Therefore, I need to address that inconsistency. ...

See Vol. 28, p. 6867-68.

[63] *See* Vol. 28, p. 6874-77.

[64] With the prospective jurors removed from the courtroom, the trial judge informed counsel:

> All right. At this time, the Court has reviewed six jurors of which there were some concerns with regard to them being maintained on the qualified panel for personal voir dire to determine what - - to reconcile the inconsistencies in their previous testimony, since the Court did not ask the five of those having to do specifically with consideration of mitigating circumstances.
>
> The Court has explained it to the six jurors, or actually five of them in which it applied, and asked if they understood. They've indicated that they did understand. And the fact that I had various responses, some confirming that they would refuse to consider mitigating circumstances, and some saying, now that they understood the difference of consideration versus weight, would consider and give it the appropriate weight at the end of the trial, the Court has reconsidered various Defense challenges for cause.

Thereafter, the trial court granted two of the previous defense challenges for cause and denied three

instructed the jury after penalty phase, and before the jury's deliberation, as to the proper consideration of mitigating circumstances.[65]

We find that the trial court promptly noted his error during voir dire, corrected the error by calling back prospective jurors who had been erroneously instructed, properly instructed these prospective jurors as to the consideration of mitigating circumstances, and re-evaluated the defense challenges for cause on these prospective jurors in light of their responses after further questioning. In addition, we find that the jury who considered the question of the defendant's sentence was properly instructed on this matter. There is no merit to the defendant's preliminary issue.

With regard to a juror's consideration of mitigating circumstances, this court has stated:

> ... "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the offense." *Penry v. Lynaugh*, 492 U.S. 302, 327-328, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256 (1989). Accordingly, "the sentencer may not be precluded from considering, *and may not refuse to consider*, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone,* 522 U.S. 269, 276, 118 S.Ct. 757, 761, 139 L.Ed.2d 702 (1998).

State v. Williams, 2001-1650 p. 13 (La. 11/1/02), 831 So.2d 835, 847 (emphasis in original). Thus, although a prospective juror does not have to commit to giving any mitigating circumstance a certain weight, the prospective juror must not refuse to consider the evidence.

In *Williams*, we noted the difficulty that a prospective juror has when questioned as to what effect he will give to certain mitigating evidence.

> At the voir dire stage of the trial, the prospective juror has no indication of what weight evidence of [certain mitigating evidence] will receive in light of other factors of the case. While the defendant may not commit

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of them, based on the prospective jurors' responses after having the law clarified for them. Vol. 28, p. 6921-30.

[65] *See* Vol. 44, p. 10860-10862.

> a prospective juror to according any particular weight to the evidence he might offer, a juror must commit himself or herself to keeping an open mind with respect to not only the statutory mitigating circumstances, but also any non-statutory circumstance the defendant proffers as the basis for returning a sentence less than death. *Williams*, 2001-1650 p. 14, 831 So.2d at 847.

In addition, we are aware that the potential to either request or elicit a prospective juror's personal feelings as to a type of evidence is very great. Neither the state nor the defendant may seek a juror's commitment to disregard or give particular weight to a specific aggravating or mitigating circumstance. *Comeaux*, 1993-2729 (La. 7/1/97), 699 So.2d 16, Appendix, p. 38-40.

As long as a trial court is convinced by the entirety of a prospective juror's responses that the juror's personal viewpoint on a particular mitigating circumstance is an isolated context and will not impede their consideration of all of the defense's mitigating factors, a cause challenge on this ground may properly be denied. *Williams*, 2001-1650 p. 14-15, 831 So.2d at 848.

Keeping in mind these legal precepts, we now turn to examine the voir dire testimony of the eight prospective jurors whom the defendant claims should have been excused from the venire for cause.

Thomas Vasta

The defendant complains the trial court erred in denying the defense challenge for cause of Mr. Vasta, claiming he was impaired as a juror because he could not seriously consider mitigating circumstances. Thereafter, the defense used its second peremptory challenge to excuse Mr. Vasta from the jury venire; preserving this issue for review.[66] *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on

[66] Vol. 34, p. 8429.

appeal.").

The record shows that upon initial questioning by the state, Mr. Vasta agreed that he would consider all of the evidence, give the evidence whatever weight he thought the evidence deserved, and then would return with a verdict and a sentence that he thought was appropriate.[67] During defense questioning, Mr. Vasta stated he could not give serious consideration to the mitigating factors of intoxication, childhood trauma or childhood sexual abuse.[68]

Due to some confusion with this panel regarding the distinction between consideration of mitigating factors, and the weight individual jurors might give them in their deliberation, the court clarified the distinction between consideration of, and weight to be given, mitigating circumstances prior to questioning jurors who appeared to have given inconsistent responses. In response to this follow-up questioning by the court, Mr. Vasta clarified that he would consider any and all mitigating circumstances.[69]

Upon further questioning by the defense, who pointed out the inconsistency of his responses, Mr. Vasta asked: "May I restate the whole thing for you?" and clarified "I will give consideration to anything said in the courtroom."[70] The defense then asked whether this response resulted from the fact that the judge would order him to consider the evidence and Mr. Vasta replied that it did not.[71]

The defense raised a challenge for cause, asserting that Mr. Vasta would be

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[67] Vol. 24, p. 5909-5910.

[68] Vol. 24, p. 5982-83.

[69] Vol. 25, p. 6019-6020.

[70] Vol. 25, p. 6052.

[71] *Id.*

unable to follow the law regarding consideration of mitigating circumstances.[72] The district court denied the cause challenge with the following observations:

> Each party may have their own view, but it's the Court's opportunity to view the various jurors, to watch their body language, listen to their inflection, their tone, watch their facial expressions, and what the Defense Counsel has portrayed as exasperation the Court viewed as enlightenment in his responses, and noting that it made all of his answers consistent both with the questionnaire, his open-mindedness on the penalty that was obtained through the State's examination and ultimately through four occasions, on the fourth, holding his ground with Defense Counsel, stating that now that I know the distinction, he was comfortable with seriously considering all mitigating factors. Mr. Vasta will not be excused, he will be maintained.[73]

Later in the voir dire, the defense utilized its second peremptory challenge against Mr. Vasta.[74]

Our review of the record shows that Mr. Vasta was properly rehabilitated by the court's clarification of the distinction between a jurors' obligation to seriously consider mitigating circumstances, and the weight assigned to that mitigating circumstance based on each jurors' individual evaluation. *See Williams*, 2001-1650 p. 14, 831 So.2d at 847. There was no abuse of the trial court's discretion in its denial of the defense challenge for cause for this prospective juror.

Ronnie Todd

The defendant complains the trial court erred in denying the defense challenge for cause of Mr. Todd, claiming he was impaired as a juror because he could not seriously consider the mitigating circumstances of intoxication or childhood trauma. Reeves asserts the court rehabilitated Mr. Todd with respect to his refusal to consider the mitigating circumstance of intoxication; however, he claims Mr. Todd was not rehabilitated with regard to the other mitigating evidence he had refused to consider.

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[72] Vol. 25, p. 6060-61.

[73] Vol. 25, p. 6062-6063.

[74] Vol. 34, p. 8429.

Reeves argues Mr. Todd was not rehabilitated after his refusal to seriously consider childhood trauma as a mitigator, because at the time rehabilitation was attempted, the court wrongfully deemed this non-statutory mitigator to be irrelevant. Thereafter, the defense used its ninth peremptory challenge to excuse Mr. Todd from the jury venire; preserving this issue for review.[75] *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal.").

In his questionnaire, Mr. Todd indicated that he would always vote for the death penalty in the case of the murder of a child.[76] Upon initial questioning by the state, however, Mr. Todd clarified that he was generally opposed to the death penalty, and stated twice that he could keep an open mind and consider both a life sentence and the death penalty as punishment at the completion of the penalty phase.[77] Mr. Todd raised no question when instructed by the state that he would have to listen to anything presented during the penalty phase, both from the state and the defense.[78] In fact, Mr. Todd stated that, in his mind, "life in prison is worse than dying."[79] Mr. Todd agreed that, even if the defense failed to present any evidence in mitigation, he would still consider a life sentence.[80] He also acknowledged that he would have to seriously consider any mitigating evidence which was presented, even though he understood he would determine how much weight to give each of those mitigating

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[75] Vol. 37, p. 9009.

[76] Vol. 24, p. 5931.

[77] Vol. 24, p. 5931-5933, 5934-5935.

[78] Vol. 24, p. 5933.

[79] Vol. 24, p. 5933.

[80] Vol. 24, p. 5933-5934.

factors:

Prosecutor:	But if he does put on mitigating factors, whatever they may be, and I'm not privy to that, whatever they may be, those mitigating factors, that you are asked to seriously consider them, but that, means not just say I'm not listening to anything, but seriously consider them. Do you think you can do that?
Mr. Todd:	As a juror, yes.
Prosecutor:	Okay. But you also understand that you determine how important or how much weight to give each of those mitigating factors; you understand that?
Mr. Todd:	Yes.[81]

During defense questioning, Mr. Todd further clarified his questionnaire response as his general opinion, but that when the prosecutor asked him to listen to the presentation of a particular case, he indicated he would keep an open mind.[82] He reiterated to defense counsel that he would keep an open mind.[83] When asked by defense counsel whether he could consider particular mitigating circumstances, Mr. Todd stated that, while he would consider the mitigators of mental disease or defect and childhood sexual assault, he would not consider intoxication and a traumatic childhood as mitigating evidence.[84]

At that point, the court interjected a question to defense counsel, clarifying that the question should be whether, if such evidence was submitted by the defense, would the prospective juror seriously consider the evidence.[85] After that, Mr. Todd asked the defense attorney to repeat the last question, at which point defense counsel asked

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[81] Vol. 24, p. 5934.

[82] Vol. 24, p. 5999-6000.

[83] Vol. 25, p. 6000.

[84] Vol. 25, p. 6001.

[85] Vol. 25, p. 6002. We note that, throughout voir dire, defense counsel improperly sought commitments from the prospective jurors, in the abstract, as to how they would view particular mitigating factors.

the question as suggested by the trial court with regard to whether Mr. Todd would seriously consider as a mitigator that the defendant had experienced a traumatic childhood. The following confusing colloquy then ensured:

Defense counsel:	Traumatic childhood.
Mr. Todd:	It kind of sounds like you got two questions of the same thing there.
Defense counsel:	Okay. Just tell me, talk to me about that.
Mr. Todd:	I'm really not sure.
Defense counsel:	Okay. Well, let me just - - we talked about mental disease or defect, and you said yes.
Mr. Todd:	Yes.
Defense counsel:	You said - -I don't - - okay, let's say that there's evidence regarding these things separately, sexual assault victim as a child.
Mr. Todd:	Yes.
Defense counsel:	And just a traumatic childhood.
Mr. Todd:	No, that's it.
Defense counsel:	Okay. Let's say that if you are on the case, on the jury, and at the - - during the penalty phase the Defense does not offer any witnesses, testimony, evidence, in mitigation, would you automatically vote for death?
Mr. Todd:	No.
Defense counsel:	Do you think that a penalty of life imprisonment without the benefit of probation, parole, or suspension of sentence is an appropriate penalty on a case-by-case analysis, case-by-case basis, in this case?
Mr. Todd:	Yes, I do.
Defense counsel:	Thank you, sir.[86]

[86] Vol. 25, p. 6002-6003.

Defense counsel asked no more questions of Mr. Todd. The court later asked Mr. Todd whether, if the law required him to consider mitigating circumstances, and particularly the mitigating circumstance of intoxication, he would do so:

> And, again, I think actually you responded that you understood and you could consider mitigating circumstances, but I believe you said intoxication you could not. But if that were ordered to be a - - the law, that you would at least consider it, could you consider it?[87]

Mr. Todd responded that he could.[88]

The defense challenged Mr. Todd for cause on the basis that he could not consider intoxication and childhood trauma as mitigating circumstances. The state objected, arguing that he was rehabilitated after being informed of the difference between consideration of, and weight to be given, mitigating circumstances.[89] The court held:

> And it's the Court's position that he wasn't actually rehabilitated on the Court's questioning, but he cleared up his inconsistencies after they were pointed out and it was explained to him what the law would be, the law that would apply, and the confusion noted in other jurors, which he acknowledged and cleared up, indicating he would consider all mitigating factors. Mr. Todd will be maintained at this time.[90]

Later, Mr. Todd was excused by the defense, using its ninth peremptory challenge.[91]

This cause challenge presents an example of the limitations of a review of a cold record. Our review of the confusing colloquy between Mr. Todd and defense counsel does not lead us to conclude, as argued by the defense, that Mr. Todd stated he would not consider the mitigating circumstance of a traumatic childhood. Certainly, Mr. Todd's responses did not lead the trial court to make that conclusion.

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[87] Vol. 25, p. 6021.

[88] *Id.*

[89] Vol. 25, p. 6070-6071.

[90] Vol. 25, p. 6071.

[91] Vol. 37, p. 9009.

Instead, the only matter unresolved from the trial court's viewpoint was whether Mr. Todd could give serious consideration to the mitigating factor of intoxication, and the court directed a specific question to ascertain Mr. Todd's response to that.

For this reason, we give deference to "a trial court's first-hand observation of tone of voice, body language, facial expression, eye contact, or juror attention." *Leger*, 2005-0011 p. 90, 936 So.2d at 169. Doing so, coupled with our own review of the record, we find that the entirety of Mr. Todd's responses committed him to keeping an open mind about all of the mitigating factors and the appropriate penalty for this particular case. *See Williams*, 2001-1650 p. 14, 831 So.2d at 847. We find no abuse of discretion in the trial court's denial of the cause challenge here, where our review of the record shows, and the trial court was convinced, that the entirety of the prospective juror's responses would not impede his consideration of all of the defense mitigating factors. *Williams*, 2001-1650 p. 14-15, 831 So.2d at 848.

Patricia Bonnette

The defense contends that the trial court abused its discretion in denying a cause challenge for this prospective juror because Ms. Bonnette was substantially impaired, in that she would not consider childhood sexual assault, a traumatic childhood or mental disease or defect as mitigation evidence. Thereafter, the defense used its third peremptory challenge to remove this prospective juror from the venire; thus, preserving this issue for review.[92] *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal.").

On her questionnaire, Ms. Bonnette indicated that she was in favor of the death

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[92] Vol. 34, p. 8430.

penalty where someone had taken another person's life.[93] When the prosecutor questioned her about this response, she stated, "Yes, in certain circumstance[s], you know, ..."[94] She was the last prospective juror of the panel whom the prosecutor questioned. Consequently, she had already listened to the prosecutor's explanations.[95] She stated she could keep an open mind as to the appropriate sentence until she heard all of the information that would be presented in the penalty phase.[96] She understood that the defense had the right to present mitigating factors, but did not have to present any if the defense chose not to. Even if the defense did not present mitigating circumstances, Ms. Bonnette claimed she could still return with a life sentence "in certain circumstances,"[97] while explaining "[i]t would have to be real good in this particular case" because the victim was a child.[98] With regard to a life sentence or the death penalty as sentences, she stated: "I can fairly consider either one, but I would want to contemplate on, you know, if I chose life in prison, I would -- I would want to give that a great consideration also."[99] She reiterated several times that she could fairly consider both possible sentences, and her determination would be comprised of "[a] fair consideration, about equal balance of both, you know, depending on the circumstances."[100]

During questioning by defense counsel, Ms. Bonnette indicated by raising her hand with other prospective jurors when prompted to signal that she would not

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[93] Vol. 24, p. 5756.

[94] *Id.*

[95] *Id.*

[96] Vol. 24, p. 5757.

[97] *Id.*

[98] Vol. 24, p. 5758.

[99] *Id.*

[100] Vol. 24, p. 5759.

consider childhood sexual assault, a defendant's traumatic childhood or mental disease or defect as mitigating evidence.[101] Later, the prosecutor asked Ms. Bonnette whether she could give serious consideration to mental retardation as a mitigating circumstance if instructed to do so by the trial judge, and she said she would.[102]

The defense challenged Ms. Bonnette for cause, arguing that she was substantially impaired in the discharge her duties fairly and impartially because of her unwillingness to consider mitigation evidence.[103] The prosecutor objected, referring to the trial court's erroneous holding, discussed at the beginning of this section, that a prospective jurors' inability to consider non-statutory mitigating circumstances was not a challenge for cause.[104] In denying the defense challenge for cause, the trial judge concluded:

> As to Ms. Bonnette, the Court notes that she did indicate in the initial orientation by the Court she would accept the law and follow her oath. Questions by [the prosecutor], open-minded, however obviously she leans toward the death penalty but indicated she would give fair consideration, her exact words I have down are, "equal balance," to both. She did indicate she would not accept non-stat ... - - would not consider non-statutory matters as given by [defense counsel], and in addition initially said she would not consider a statutory consideration. On rehabilitation she said if she was told to follow the law and the law was to acknowledge mitigation factors she would follow the law. Accordingly, in evaluating her expressions, the tone, inflection, the seriousness of her responses, while it does appear she may lean toward death is not a reason in and of itself. The Court will maintain Ms. Bonnette based on the totality of her responses and the observations in court.[105]

This was not the end of the discussion about Ms. Bonnette, however. The record shows that Ms. Bonnette was one of the five prospective jurors called back for

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[101] Vol. 24, p. 5780, 5782, 5785.

[102] Vol. 24, p. 5839-5840.

[103] Vol. 24, p. 5857.

[104] *Id.*

[105] Vol. 24, p. 5858.

additional questioning after the trial judge realized the error in his prior instructions.[106] After re-instructing these prospective jurors as to the difference between giving serious consideration to a mitigating circumstance and the weight that each individual juror would apply, the trial judge again questioned Ms. Bonnette:

> Court: Ms. Bonnette. Also, Ms. Bonnette, you had indicated that you would give fair consideration and consider giving both life and death, depending on the facts. And then upon being asked about mitigating circumstances, I believe there were some you indicated you could not or would not consider, and I need to ask at this point, do you understand the distinction I'm making between seriously consider them — considering those items as opposed to what weight in your own mind you would give those items?
>
> Ms. Bonnette: I would consider - - I would listen and consider the mitigating evidence, but I - - I couldn't tell you right now how I would - - I would consider - -
>
> Court: Well, until you've heard everything, it would be hard to say.[107]

Ms. Bonnette then told the court that she would seriously consider all of the mitigating circumstances "and then think about it."[108]

Ms. Bonnette agreed with the prosecutor, who was allowed to re-question her, that the concepts of consideration and weight "sort of get all jumbled together."[109] She told the prosecutor she could keep an open mind as to what the mitigating factors would be, even when the defendant's childhood and the sexual assault of the defendant when he was young were included in the prosecutor's example.[110] The prosecutor explained that no evidence had yet been presented, but that the attorneys

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[106] Vol. 28, p. 6873-6877.

[107] Vol. 28, p. 6882.

[108] Vol. 28, p. 6883.

[109] Vol. 28, p. 6890.

[110] Vol. 28, p. 6890-6891.

were just giving the prospective jurors "little blips" to see if they could keep an open mind and listen to what would be presented. Ms. Bonnette agreed that she could keep an open mind, listen to whatever was presented "- - and with good conscience, you know," "- - I'd use that."[111] Ms. Bonnette understood that if she could not do that, she would not be a fair juror.[112]

Upon re-questioning by the defense, Ms. Bonnette responded that she would listen to everything presented and then would judge accordingly.[113] When the defense attorney separately indicated the mitigating factors of intoxication, childhood trauma, childhood sexual abuse and mental disease or defect, Ms. Bonnette answered that each of these factors standing alone could be a reason to impose a life sentence.[114] Ms. Bonnette told defense counsel that she would be willing to listen to the mitigating factors, which all mattered to her decision.[115]

After the clarification questioning was completed, defense counsel re-urged his challenge for cause for Ms. Bonnette, arguing that she had felt duty-bound by the trial court's instructions to answer the way she did.[116] The state objected, after which the trial court held:

> The record is sufficient as to the foundation laid, the questions established by the Court, the various positions clarifying from the entire panel listening to one another respond, all of them being distinct, independent, individuals in their own rights. The Court has made the ruling, actually accepting three additional challenges in order to clear up any inconsistency in prior voir dire, and will defer to the record in its entirety for an evaluation of the remaining jurors, ... Bonnette ... .[117]

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[111] Vol. 28, p. 6892.

[112] *Id.*

[113] Vol. 28, p. 6905.

[114] Vol. 28, p. 6905-6906.

[115] Vol. 28, p. 6906.

[116] Vol. 28, p. 6923-6926.

[117] Vol. 28, p. 6929-6930.

Later, after general voir dire, the defense expended its third peremptory challenge to remove Ms. Bonnette from the venire.[118]

Our review of the record convinces us that Ms. Bonnette was completely rehabilitated after being re-instructed by the trial court and through the additional questioning of both the state and the defense. Upon being instructed of the difference between her serious consideration of a mitigating factor, and the weight that she would be entitled to assign each factor, Ms. Bonnette indicated she would keep an open mind with respect to not only the statutory mitigating circumstances, but also any non-statutory circumstance the defendant might proffer as the basis for returning a sentence less than death. *Williams*, 2001-1650 p. 14, 831 So.2d at 847. The trial court did not abuse its discretion in denying a cause challenge for this prospective juror.

Ivy Sanford

The defendant contends that the trial court abused its discretion in denying his cause challenge for this prospective juror. The record shows, however, that the defense failed to use a peremptory challenge to dismiss this prospective juror from the venire. In fact, Ms. Sanford was initially accepted as a juror by both the state and the defense.[119] Subsequently, Ms. Sanford was backstruck by the state, which used one of its peremptory challenges to remove her.[120] Consequently, the defense has not preserved this issue for review. *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal.").

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[118] Vol. 34, p. 8430.

[119] Vol. 34, p. 8428.

[120] Vol. 35, p. 8676.

2. Cause Challenges - Substantial Impairment Pro-Death Penalty

For the following prospective jurors, the defendant claims the trial court improperly denied defense cause challenges based on the fact that their voir dire responses showed they would not consider a life sentence.

Bradford Miller

The defendant argues that the trial court abused its discretion in denying a defense challenge for cause for prospective juror Bradford Miller based on his voir dire responses that he would always impose a death sentence for a defendant found guilty of the rape and murder of a 4 year old child. Reeves contends Mr. Miller refused to consider a life sentence unless there were very severe mitigating circumstances and refused to consider certain mitigating evidence. After the trial judge denied the defense's cause challenge for this prospective juror, the defense used its sixth peremptory challenge to excuse him from the venire; thus preserving this issue for review.[121] *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal.").

The record shows that Mr. Miller was the last prospective juror questioned by the state in his panel.[122] After listening to the prosecutor's explanation to the other thirteen prospective jurors, Mr. Miller agreed he had a better appreciation of the process in a capital murder case.[123] Knowing that the case involved the aggravated rape and death of a 4 year old child, Mr. Miller stated that he could keep an open

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[121] Vol. 35, p. 8673.

[122] Vol. 22, p. 5356.

[123] *Id.*

mind as to sentence until the penalty phase was completed.[124] When questioned about his response on the juror questionnaire, in which he had indicated he would always vote to impose the death penalty, Mr. Miller agreed that he was generally in favor of capital punishment as part of our society and that the death sentence should be an option in certain cases.[125] However, he affirmed that, as far as the actual imposition of sentence in this case, he could listen as a juror to whatever the defense offered in the penalty phase, with the understanding that the defense could choose to present no evidence, and that he could wait until after closing arguments in the penalty phase before determining the appropriate penalty.[126] Mr. Miller indicated he could return with a life sentence if he felt that the appropriate sentence in the case of a child being murdered was life imprisonment.[127] Mr. Miller reiterated that he could keep an open mind, both to the defense, who would be arguing for a life sentence at that point, and the state, who would be arguing in favor of capital punishment.[128] Mr. Miller understood both sides wanted him to be fair, to not pay lip service to the instructions, but to listen to both sides and base his decision on what he heard, whatever that might be.[129]

During defense questioning, Mr. Miller and defense counsel discussed the awkwardness of being asked whether he would consider something before knowing what the information was.[130] Upon being questioned about his questionnaire response, where he indicated he would always vote for the death penalty for the rape

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[124] Vol. 22, p. 5358.

[125] *Id.*

[126] Vol. 22, p. 5359.

[127] *Id.*

[128] Vol. 22, p. 5360.

[129] Vol. 22, p. 5361.

[130] Vol. 22, p. 5407.

and murder of a child, Mr. Miller explained:

> That's what I answered, but as I said earlier, I thought - - I wasn't aware of the guilt phase and sentencing phase, so I think I would be able to do that, no problem; however, I also would have a - - would be able to consider alternatives to that.[131]

When asked by defense counsel if he actually meant he could consider a life sentence, Mr. Miller answered: "It would have to be a very, very severe mitigating circumstance, because there's a lot of - - I said it's a very, very broad spectrum, it's nothing black or white."[132] By way of illustration, Mr. Miller explained: "... For example, mental illness could range from mild depression to someone that's been in a psychiatric ward for 30 years and on medication and - - there's a very, very broad range there."[133] With regard to the mitigating circumstances raised by the defense,[134] Mr. Miller agreed that he could consider those mitigating factors, depending on the quality and nature of the testimony.[135]

Thereafter, the defense raised a cause challenge against Mr. Miller, arguing that he would impose a death sentence in cases like this, which opinion was backed up by his initial questionnaire response.[136] After the state's objection, the trial judge held:

> The Court takes - - reference notes, he said that on his questionnaire that he would vote to impose, but after - - wanted it to be understood that that was his view on society as a whole, and understood that it would be optional. Under the questioning by the defendant he understands the two phase and mitigation and would consider them. The Court does not find at this point that he should be dismissed for cause and will maintain Mr. Miller.[137]

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[131] Vol. 22, p. 5408.

[132] Vol. 22, p. 5409.

[133] *Id.*

[134] Defense counsel specifically noted "traumatic childhood, sexual assault victim as a child, psychiatric diagnosis or suffer from a mental disease or defect... ." Vol. 22, p. 5409.

[135] Vol. 22, p. 5410.

[136] Vol. 22, p. 5439.

[137] Vol. 22, p. 5440.

After general voir dire questioning, the defense exercised its sixth peremptory challenge to have Mr. Miller removed from the venire.[138]

Our review of Mr. Miller's *Witherspoon* questioning reveals no grounds upon which to believe his views on the death penalty were such that they would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions or oaths. Although Mr. Miller believed that the death penalty has its place in society, and was a consideration for penalty in cases like this in particular, "not every predisposition or leaning in any direction rises to the level of substantial impairment." *Leger*, 2005-0011 p. 77, 936 So.2d at 161, *quoting State v. Lucky*, 1996-1687 p. 7 (La. 4/13/99), 755 So.2d 845, 850, *cert. denied*, 529 U.S. 1023, 120 S.Ct. 1429, 146 L.Ed.2d 319 (2000). Our review of the entirety of this prospective juror's voir dire responses reveals no substantial impairment. There was no abuse of discretion in the trial court's denial of the defense's cause challenge for this prospective juror.

Daniel Norton

The defendant claims the trial court abused its discretion in denying his challenge for cause for prospective juror Daniel Norton, claiming his voir dire responses showed he would always vote for the death penalty as punishment for the rape and murder of a child, and that he would automatically vote for the death penalty if the defense failed to present mitigating evidence. The record shows the defense used its 10th peremptory challenge in a backstrike against Mr. Norton, thus preserving this issue for review. *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on

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[138] Vol. 35, p. 8673.

appeal.").

The record shows, contrary to defense counsel's characterization, that Mr. Norton actually stated on his questionnaire and in questioning that he was indifferent on the question of the death penalty and could "live with it, live without it."[139] Although he indicated on his questionnaire that he would always vote to impose the death penalty if a defendant is guilty of the rape and murder of a child, and that he had strong feelings about that, he clarified that response by stating: "... I mean, that's the first question, most people are going to have the same response to it. ... But when you ask later on about, you know, extenuating or mitigating circumstances, I mean, you really have to consider all of it."[140] He also indicated he would be willing to listen to whatever evidence was presented in the penalty phase before he determined the appropriate sentence.[141] He understood that the defense had the right to present mitigating factors, but were not required to, and that in either case he could return a life sentence if that is what he felt was appropriate.[142] Mr. Norton also indicated he could seriously consider any mitigating factors raised by the defense.[143] He affirmed that he could keep an open mind as to both a life sentence and the death penalty.[144]

When the defense counsel asked the panel as a whole to indicate, by a show of hands, who had marked their questionnaires that they would always vote to impose the death penalty for the rape and murder of a child, Mr. Norton raised his hand.[145] When questioned individually by defense counsel, Mr. Norton stated the following:

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[139] Vol. 24, p. 5938.

[140] Vol. 24, p. 5941, *see generally* Vol. 24, p. 6938-5941.

[141] Vol. 24, p. 5940.

[142] *Id.*

[143] Vol. 24, p. 5940-5941.

[144] Vol. 24, p. 5942.

[145] Vol. 24, p. 5959.

Defense Counsel: Mr. Norton, as I said earlier, your body language speaks loud, and I saw you, you know, nod in agreement, and I saw some puzzlement from time to time, even while I was sitting over here. Do you have a better feel for things?

Mr. Norton: Yes, sir. I think the question that you keep asking about 81, there's a lot of shock value when that's the only statement you see without seeing, okay, without any other alternatives. I mean, I for one, if it had been stated, read all the - - all the - - all the possibilities and give the one - - answer the one that most best suits the way that you feel, it may have been a little different. But, I mean, the way it was asked, I mean, it's just a shock value question, I mean, and then read further down the line, that's - - it - -

Defense Counsel: Right.

Mr. Norton: - - and it changes a little bit.

Defense counsel: And like I was telling - - or said to [another prospective juror], when I saw the red hats, it just jumped out at me. That question last Thursday I'm sure just kind of jumped out at you when you read it.

Mr. Norton: Right.

Defense Counsel: And - - and considered a response to that. Mr. Norton, you obviously have strong feelings about the death penalty, right? Let me back up. You said generally in favor. I'm trying to be fair to you and not just accuse you of things. You did put down two answers - - did you - - did you recall that - - do you recall that?

Mr. Norton: Recall which answer?

Defense Counsel: You know, you put down "A" and "C", "A" being will always vote in favor of death penalty involving a rape, murder of a child.

Mr. Norton: Right.

Defense Counsel: And then "C", I see that you have here"C", you're generally in favor of death penalty but can put aside and impose - - well, - -

Mr. Norton: Right. I mean, when you first asked the question, it

doesn't say read all the responses and pick the one that best suits you. It just - - you know, that one right there, when you see the rape and murder of a child, I mean, that - - it didn't say anything else. And once I read further down, I mean, I agreed with that one as well, I mean, - -

Defense Counsel: Okay. Do you think that a life sentence is a substantial sentence?

Mr. Norton: Yes.

Defense Counsel: And it may be appropriate in a death penalty case?

Mr. Norton: Yes.

Defense Counsel: Would you consider intoxication as a mitigating circumstance, if presented?

Mr. Norton: I consider all mitigation as, you know, seriously; whether I put much weight to any particular one, you know, - -

Defense Counsel: I'm sorry.

Mr. Norton: I said, whether I put much weight to any of them in particular, you know - -

Defense Counsel: - - that's for you to decide, right.

Mr. Norton: That's exactly right.

Defense Counsel: Okay. What about childhood trauma?

Mr. Norton: Like I said, I - - everything that you read on the list I would give serious constitution [sic] to, I mean; the weight, I mean, that's two separate questions right there.

Defense Counsel: Yes.

Mr. Norton: The weight that you attribute to each particular thing that the law requires that is a mitigating circumstance, you know, that's different from how strongly I feel about each particular one of them.

Defense Counsel: How about if you heard no mitigation from the Defense, would you vote - - automatically vote death?

Mr. Norton: Yes, sir.[146]

At this point, defense counsel stopped questioning Mr. Norton, after securing this one response that might support a finding of substantial impairment. However, the state cleared up any confusion by the following rehabilitation:

Prosecutor: ... Mr. Norton, the same question, you said that in the death of a child, no mitigating evidence presented, you'd automatically vote for the death penalty.

Mr. Norton: I didn't understand that we could go back and review any - -

Prosecutor: You do understand that now?

Mr. Norton: Yes, sir.

Prosecutor: Will you assure me and the Court that you will do that, you will examine all of the evidence, - -

Mr. Norton: Yes, sir.

Prosecutor: - - both phases?

Mr. Norton: Yes, sir.

Prosecutor: Any evidence you find that you deem to be mitigating, - -

Mr. Norton: Yes, sir.

Prosecutor: - - will you consider it seriously?

Mr. Norton: Absolutely.[147]

The defense sought to remove Mr. Norton for cause, arguing that he indicated he would automatically vote for death if the defense failed to present mitigating evidence.[148] After the state objected, the trial court ruled as follows:

The Court notes that he - - I think was defined as being indifferent on

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[146] Vol. 25, p. 6007-6010.

[147] Vol. 25, p. 6033-6034.

[148] Vol. 25, p. 6071-6073.

> his questionnaire and could go either way depending on the situation. Clearly would consider mitigation and even under the questions established by Defense Counsel with except - - the only juror that seemed to understand the difference between consideration and weight issues, clearing it up on his examination, which was somewhat late in the proceedings. In addition, he was quite articulate in expressing why some of the questions were answered the way they were with regard to the questionnaire, and consistent throughout other than the one statement that if he found first degree murder - - .
>
> Defense counsel: Guilt - -
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> - - found the guilt phase and nothing was presented then he would automatically vote for death, not having anything to consider. During rehabilitation it was clearly pointed out that he would have the entire trial proceedings that would be a part and parcel of those penalty phases for consideration and weight as they deemed appropriate, and indicating having that to view would not automatically vote but would make a considered decision based on what was there to evaluate. The Court would deny the Defense motion and keep Mr. Norton.[149]

The record shows that Mr. Norton was initially accepted as a juror by both the state and the defense.[150] However, he was later backstruck by the defense and removed by use of its tenth peremptory challenge.[151]

This court has previously noted that "[w]hile the reviewing court must carefully review the record of voir dire for abuses of discretion, it need not and should not attempt to reconstruct the voir dire by a microscopic dissection of the transcript in search of magic words or phrases that automatically signify either qualification or disqualification. ... This court must look to the entire voir dire on this subject matter and not individual responses." *Leger*, 2005-0011 p. 76-77, 936 So.2d at 161 (citation omitted). The single response which would have supported the defendant's argument cannot stand when balanced against the entirety of this prospective juror's thoughtful responses. The record clearly supports the conclusion that this prospective juror was

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[149] Vol. 25, p. 6073-6074.

[150] Vol. 35, p. 8676.

[151] Vol. 37, p. 9011.

rehabilitated in that one regard, and suffered no impairment which would impair him in the performance of his duties as juror in accordance with his instructions or oaths. We find no abuse of discretion in the trial court's denial of the defense's cause challenge for Mr. Norton.

Mary Mhire

The defendant contends that the trial court abused its discretion in denying a case challenge to prospective juror Mary Mhire, arguing she indicated she would not consider a life sentence if the defense failed to present mitigating evidence. The record shows that the defense challenged this prospective juror for cause, which was denied by the trial court.[152] However, the record also shows that jury selection was completed before Ms. Mhire was called back to a general voir dire panel. Consequently, the defense did not expend a peremptory challenge to remove this prospective juror from the venire, and the issue raised by the defense with respect to this juror is not preserved for our review. *See Blank*, 2004-0204 p. 25, 955 So.2d at 113 ("In Louisiana, a defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal.").

Larry Davis

The defense contends the trial court abused its discretion in denying a defense cause challenge for prospective juror Larry Davis. According to the defense, Mr. Davis stated he would always vote for death in the case of a child's rape and murder, and if no mitigation evidence was presented by the defense.

The record shows that the trial court denied a cause challenge raised by the defense against this prospective juror.[153] Ordinarily, under Louisiana law, "a

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[152] Vol. 32, p. 7935-7937.

[153] Vol. 30, p. 7256-7262.

defendant must use one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal." *See Blank*, 2004-0204 p. 25, 955 So.2d at 113. In the matter of Mr. Davis, however, the record shows that the 12-member jury was selected, and the defense had exhausted its twelve peremptory challenges under La. Const. art. 1, § 17 and La. C.Cr.P. art. 799 before Mr. Davis was reached.[154] The peremptory challenge exercised against Mr. Davis was made during the selection of alternate jurors, and, thus, is governed by La. C.Cr.P. art. 789.

La. C.Cr.P. art. 789 provides:

> **Art. 789. Alternate jurors**
>
> A. The court may direct that not more than six jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who become unable to perform or disqualified from performing their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. If the court determines that alternate jurors are desirable in the case, the court shall determine the number to be chosen. The regular peremptory challenges allowed by law shall not be used against the alternate jurors. The court shall determine how many additional peremptory challenges shall be allowed, and each defendant shall have an equal number of such challenges. The state shall have as many peremptory challenges as the defense. The additional peremptory challenges may be used only against alternate jurors. Except in capital cases, an alternate juror who does not replace a principal juror may be discharged when the jury retires to consider its verdict.
>
> B. In a capital case, at the conclusion of the guilt phase of the trial, alternate jurors that have not replaced principal jurors shall not be discharged, but shall be sequestered from other members of the jury until the jury has reached a verdict. If a sentencing hearing is mandated, the alternate jurors will be returned to the jury and will hear the evidence presented at the sentencing hearing and will be available to replace principal jurors.

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[154] *See* n. 60. Mr. Davis was not one of the twelve defense peremptory challenges exhausted prior to the selection of the jury.

C. If the court, as provided in Paragraph A, replaces a principal juror with an alternate juror after deliberations have begun, the court shall order the jury to begin deliberations anew.

The record shows that after the 12-member jury was selected, a number of prospective jurors remained in the last panel questioned. From these remaining prospective jurors, alternate jurors were selected for this case.[155] Mr. Davis was one of those persons remaining in the panel. Pursuant to La. C.Cr.P. art. 789, the trial court determined that four alternate jurors would be selected; and that the state and the defense would have one peremptory challenge each for each alternate juror.[156] The defense used their second additional peremptory challenge to remove Mr. Davis as the second alternate juror.[157]

The use of an additional peremptory challenge on Mr. Davis as a second alternate, pursuant to La. C.Cr.P. art. 789, did not have any impact on the number of peremptory challenges allowed the defendant as a matter of law to select a jury, pursuant to La. C.Cr.P. art. 799. As is reflected in Art. 789(A), regular peremptory challenges allowed by law shall not be used against the alternate jurors, and additional peremptory challenges may only be used against alternate jurors. Thus, even if the trial court erred in denying the cause challenge as to Mr. Davis, no substantial violation of constitutional and statutory rights occurred requiring reversal of conviction and sentence.

Since prejudice is not presumed, as occurs in the erroneous denial of a cause challenge for a prospective juror for whom the defense subsequently exhausts a peremptory challenge in the constitution of the 12-member jury, this error, if any, can only serve as the basis for relief if the defendant can show that substantial rights to

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[155] Vol. 37, p. 9016.

[156] Vol. 37, p. 9016-9022.

[157] Vol. 37, p. 9022-9023.

which he was entitled have been affected. *See* La. C.Cr.P. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."). Here, no alternate jurors were involved in the deliberation of guilt or punishment. Thus, the defendant fails to show any prejudice suffered by the defendant, or any ground for reversal, in the denial of his cause challenge to Mr. Davis, and his later use of an additional peremptory challenge for the selection of alternate jurors.

3. Cause Challenges - Jurors Who Could Not Consider Death Penalty

For five prospective jurors, the defendant argues the trial court improperly removed jurors on the state's cause challenge whose voir dire responses showed that, although they were more inclined toward a life sentence, they could both consider the death penalty and agree to follow the law.

Kimberleigh Harris

The defense claims the trial court erroneously granted the state's cause challenge for prospective juror Kimberleigh Harris. Contrary to the state's characterization, the defense maintains that Ms. Harris did not vacillate in her responses, but instead made a single statement that she could not impose the death penalty based on her religion. Other than this one isolated comment, the defense argues Ms. Harris demonstrated her willingness to follow the law and her ability to impose a death sentence.

In her questionnaire, Ms. Harris indicated she did not believe in the death penalty.[158] During state questioning, Ms. Harris related that she did not believe in the death penalty, even though a family friend had been murdered.[159] In the same response, however, she also distinguished herself from other prospective jurors in the

[158] Vol. 22, p. 5352.

[159] Vol. 22, p. 5353.

panel who were opposed to the death penalty by stating, " . . . I am opposed of (sic) it, but if, you know, - - I think I could, you know, be able to , you know, do the death penalty."[160] Immediately thereafter, she confirmed for the prosecutor that she was "philosophically, morally, or religiously opposed to the death penalty," but could "follow the law providing for the imposition of the death penalty."[161] When asked point blank: "If you felt the defendant should be executed, could you vote for that?", her response in the record is: "[Pause] No."[162] She agreed with the prosecutor's characterization that she could not fairly consider both punishments.[163] She agreed that it was one thing to say she could consider the death penalty, but another thing to say she could impose that sentence.[164] Ms. Harris based her opinion on her religious beliefs.[165]

Upon defense questioning, Ms. Harris raised her hand when defense counsel asked the panel who would not consider sexual assault as a child as mitigation evidence.[166] She also raised her hand to indicate she would not consider as mitigating the factor of mental disease or defect.[167] In individual questioning, Ms. Harris told defense counsel she believed that sometimes defendants claimed to have a mental illness in order to receive a sentence of life instead of the death penalty.[168] Defense counsel responded:

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[160] *Id.*

[161] *Id.*

[162] Vol. 22, p. 5354.

[163] Vol. 22, p. 5355.

[164] *Id.*

[165] *Id.*

[166] Vol. 22, p. 5370.

[167] Vol 22, p. 5370.

[168] Vol. 22, p. 5396.

> Okay. ma'am, and that - - I respect that, and, you know, if you feel that way, we can talk about that later, and I have no problem with that, and that may be true. But that's what the trial is about, if we present that evidence, you have to consider it and weigh it as you will and give it credence or what you think it deserves. So, that's part of your function, it's part of your role as a juror, you get to evaluate the credibility, the believability of whatever witness, expert, non-expert, you get to consider that and do what you will with it. So if you tend to - - if you don't believe it, then that's - - you have a right to not believe it. Does that help you at all, or make any sense to you?[169]

Ms. Harris replied, "Yes."[170]

In later defense questioning, Ms. Harris agreed that she had just said she could not impose the death penalty.[171] She could not think of an appropriate circumstance or situation where she could seriously consider a sentence of death.[172] When asked if she would have an automatic vote if she were selected for this jury, Ms. Harris ultimately indicated she could impose the death penalty under the proper circumstances, after some vacillation.[173]

After a defense discussion with various prospective jurors in this panel about their consideration of mitigating circumstances, the trial court attempted to clarify

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[169] Vol 22, p. 5396.

[170] *Id.*

[171] Vol. 22, p. 5405.

[172] *Id.*

[173] When asked if she would have an automatic vote, Ms. Harris responded:

> No, I wouldn't - - I mean, - - I can't answer that, because, you know, you're saying - - I'm not there so I can't say whether or not I'll want him to have the death penalty or whether I want him to have life, but opposing this right - - opposing, basically, you don't want it - - I mean, you don't believe in it or whatever you would - - you know, it's like I say I don't believe in it.

[Defense counsel: Yes, ma'am.]

> But it does not mean that it - - I couldn't do it.

[Defense counsel: So you could do it under the proper circumstances.]

> Yeah.

Vol. 22, p. 5406.

Ms. Harris' responses:

> Court: Ms. Harris, there was an example of a mitigating - - some mitigating circumstances that you indicated that you would not consider. Is that still your position?
>
> Ms. Harris: Yes, sir.
>
> Court: You're probably the hardest for me to hear.
>
> Ms. Harris: Yes sir.
>
> Court: Is that still your position?
>
> Ms. Harris: Yes.
>
> Court: All right. Now with regard to the questions I asked, anything, [Prosecutor]?
>
> Prosecutor: No, Your Honor.
>
> Court: Anything, [Defense counsel]?
>
> Defense Counsel: Nothing, Your Honor.[174]

The state raised a cause challenge for Ms. Harris, arguing that she spent a good part of both examinations saying she could not consider capital punishment, but that her last comment to the defense counsel was that she could consider the death penalty.[175] After defense counsel's argument, the trial court ruled:

> The Court references, as before, notes that she, during discussions with the State, her questionnaire said do not believe in the death penalty, could not consider. Defense indicated she - - first she could not consider death under any circumstances, followed up by an additional question, could, under circumstances, however she did raise her hand and would not consider mitigating circumstances, specifically those of traumatic childhood - no, strike that - those of mental disease, is the one that she responded in the affirmative to that she would not consider. There was no rehabilitation, and the last question that the Court asked her specifically addressed that. Under *State v. Williams*, 821 So.2d 835 (sic), and emphasis put on *State v. Roy*, 681 So.2d 1230, consideration of mitigating circumstances; the Court also references under *State v. Langley*, 711 So.2d 651, inasmuch as the inability to commit to consider is often sufficient grounds. The Court would note that she vacillated

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[174] Vol. 22, p. 5415-5416.

[175] Vol. 22, p. 5426.

> continuously, and taking that into consideration with the fact that she could not accept all mitigating factors as requested, or even consider those mitigating factors of a substantial nature, the Court would grant the State's challenge for cause.[176]

The record supports the trial court's conclusion that Ms. Harris was substantially impaired as a juror due to her confusion, apparent on the record, over her view of the death penalty and her inability to consider mitigating circumstances. There was no abuse of the trial court's discretion in granting the state's cause challenge for this prospective juror.

Derick Daniels

The defendant argues the trial court improperly granted the state's cause challenge to Derick Daniels, arguing Mr. Daniels' voir dire responses showed that, while he was not a supporter of the death penalty, he would consider all the evidence and facts, be a fair juror, and not automatically vote for a life sentence.

The record completely belies the defendant's characterization of Mr. Daniels' voir dire testimony. The record shows that Mr. Daniels raised his hand during the court's initial questioning, signifying he could not vote for a death sentence, even if he determined that death was the appropriate penalty.[177] During the court's individual questioning on this issue, Mr. Daniels was asked whether, regardless of the evidence, he would be unable even to consider imposing a death sentence. Mr. Daniels responded, "Yes, sir, I feel like I'm just not for the death penalty."[178] When asked if he would automatically vote for a life sentence, regardless of the evidence, Mr. Daniels responded: "I really don't know - - I really don't know, but I just - - I'm just not for the death penalty. I would consider all the evidence and give it - - be fair as

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[176] Vol. 22, p. 5426-5427.

[177] Vol. 23, p. 5667.

[178] Vol. 23, p. 5668.

I could -."[179] After the trial judge explained again about the bifurcated procedure in a capital trial, the court asked Mr. Daniels point blank: "Now, what I'm asking is would you automatically vote for life imprisonment if it got to the penalty phase because of your views on the death penalty?"[180] Mr. Daniels responded: "Yes, sir, I guess I would."[181] The trial court then followed up and asked: "Are you telling me that you're so opposed to the death penalty you could never vote to impose it under any circumstances?"[182] Mr. Daniels replied: "Yes, sir."[183]

Mr. Daniels reiterated his strong opposition to imposition of the death penalty when questioned by the prosecutor. He affirmed that he was fundamentally opposed to capital punishment.[184] He told the prosecutor: "I feel like I'm playing God if I say go ahead and kill a man, you know, I feel like that I'm not better than the killer."[185] He affirmed that, on his questionnaire he had written "two wrongs don't make a right" and had indicated he was personally, morally, or religiously opposed to the death penalty and would never vote to impose it under any circumstances, regardless of the facts and the law in a case.[186] He affirmed to the prosecutor that he would automatically vote for life imprisonment because of his personal beliefs, and, when asked if his opinion on the death penalty would still be the same in a worst case scenario such as a mass murderer, Mr. Daniels stated: "Yes, sir, I'll let God deal with

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[179] Vol. 23, p. 5668.

[180] Vol. 23, p. 5670.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Vol. 23, p. 5706.

[185] *Id.*

[186] Vol. 23, p. 5707.

'em."[187]

In response to defense counsel's questioning as to whether anyone on the panel would not consider as mitigating evidence that the defendant had been a victim of sexual assault as a child, Mr. Daniels raised his hand.[188] He later indicated he did not understand the question.[189] In individual questioning by the defense, Mr. Daniels stated that he had held the belief that he would not consider the imposition of the death penalty under any circumstances, regardless of the facts of a case, ever since he had been able to reason.[190] When the defense attorney asked Mr. Daniels if he could ever envision any type of case, even a worst case scenario, where the death penalty would be appropriate, Mr. Daniels responded: "No, not even if it was my own child."[191] Defense counsel replied, "I don't think it gets any stronger than that, sir."[192]

The state challenged Mr. Daniels for cause and the defense did not challenge the motion. The trial court noted that Mr. Daniels was adamant in his belief and excused Mr. Daniels for cause.[193]

Initially, we note that, by failing to object to Mr. Daniels' removal, the defense failed to preserve this issue for review. La. C.Cr.P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."). Nevertheless, the record overwhelmingly supports the trial court's conclusion that this prospective juror's views on the death penalty were such that they would prevent or substantially impair the performance of his duties in accordance

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[187] Vol. 23, p. 5708.

[188] Vol. 24, p. 5775.

[189] Vol. 24, p. 5779.

[190] Vol. 24, p. 5790-5791.

[191] Vol. 24, p. 5791.

[192] *Id.*

[193] Vol. 24, p. 5842-5843.

with his instructions or oaths. The trial court did not abuse its discretion in granting the state's cause challenge for this prospective juror.

Jessica Bates

The defendant contends the trial court improperly excused prospective juror Jessica Bates on the state's cause challenge, arguing that, while she was generally opposed to the death penalty, she could put aside her feelings and impose the death penalty if that was the appropriate penalty under the facts and law.

In discussing her questionnaire responses with the prosecutor, Ms. Bates indicated her feelings for the death penalty were that, while she was generally opposed to it, she could return that sentence if she found it appropriate in a specific case.[194] However, she immediately told the prosecutor: "I don't think it's my decision [to return a sentence of death]. I don't think I could ever choose to actually send somebody to - - you know, to death."[195] She clarified her conflicting responses by stating that, while she saw the death penalty as an appropriate sentence in a general, philosophical sense, she, as an individual, could never impose that sentence, based on her personal beliefs and feelings.[196] She affirmed she would always vote for a life sentence, and would do so automatically because of her personal convictions and beliefs.[197] She stated she would not vote for the death penalty, regardless of the facts of the evidence.[198] Given a worst case scenario of a mass murderer, Ms. Bates agreed she could never vote to impose the death penalty, adding: "I just don't think it's my

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[194] Vol. 28, p. 7000.

[195] Vol. 29, p. 7001.

[196] Vol. 29, p. 7001.

[197] Vol. 29, p. 7002-7003.

[198] Vol. 29, p. 7003.

decision."[199] She then reiterated she would automatically vote for life imprisonment and agreed with the prosecutor's statement: "[a]nd so we'd sort of be wasting our time with you on this jury; is that right?"[200]

During defense questioning, Ms. Bates responded to a question asking if she was pretty much opposed to the death penalty: "Yes. Well, it's not that I don't believe in it, it's just I don't think that's my decision."[201] In response to a defense hypothetical set of facts which were actually closely aligned with the facts of this case, Ms. Bates answered, somewhat confusingly, that she did not know if she could not seriously consider imposing the death penalty because she was not in the position yet and was not certain she would not feel differently if picked for the jury.[202] Upon being pressed by the defense for an answer, she stated it would be a very tough decision for her to ever impose a death sentence, and that she could not see herself ever imposing that sentence, even under the facts in the scenario.[203]

The state challenged Ms. Bates for cause, arguing she repeatedly stated she could never see herself imposing the death penalty.[204] After listening to the defense's argument, the trial court ruled:

> Initially - - the Court would note when asked specifically a question about the law, if they could impose the death penalty, she indicated that she could; however, then in the questioning by the State on the evaluation of her questionnaire, she clearly stated that policy considerations, she approved of that being something, the death penalty was allowed, but that she could never give the death - - in fact, had told the State that she would automatically give life, based on personal beliefs. When questioned by the Defense, the best answer she could

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[199] Vol. 29, p. 7004.

[200] Vol. 29, p. 7004-7005.

[201] Vol. 29, p. 7048.

[202] Vol. 29, p. 7048.

[203] Vol. 29, p. 7049.

[204] Vol. 29, p. 7063-7064.

> give, under a scenario was, "I don't know." She did made [sic] the specific - - and I quote, "I could not see me imposing death. I believe in it, I cannot personally impose it." Again, the Court cannot take one or two answers to determine that but must look at the totality. It's noted that she was very considerate and deliberate when asked these specific questions. The Court would find that the totality of her response shows a serious impairment and would excuse Ms. Bates for cause on the State's motion.[205]

The record supports the trial court's conclusion that this prospective juror's views on the death penalty would prevent or substantially impair her in the performance of her duties as juror in accordance with her instructions or oaths. While Ms. Bates may have theoretically agreed with the imposition of the death penalty, she repeatedly said that she could not impose capital punishment and would automatically vote for life imprisonment, no matter what the facts were in the case presented to her. We find no abuse of the trial court's discretion in granting the state's cause challenge for this prospective juror.

Shawn Jackson

The defendant argues the trial court improperly granted the state's cause challenge to prospective juror Shawn Jackson, claiming he could consider imposing the death penalty under appropriate circumstances.

In questioning by the prosecutor, Mr. Jackson stated that he was morally, and for religious reasons, opposed to the death penalty and that he believed a life sentence was a severe enough punishment. Mr. Jackson could not consider imposing a death sentence in any case other than one involving mass murder. In this case, where the issue was the rape and murder of a single child, Mr. Jackson repeatedly indicated he would automatically return a life sentence and would not consider imposing the death penalty.[206]

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[205] Vol. 29, p. 7064-7065.

[206] Vol. 29, p. 7005-7015.

Under defense questioning, Mr. Jackson repeated his position, stating that a person convicted of murder should suffer the rest of their life in prison, thinking about what they had done. He stated he had held this belief since the murder of his sister, whose killer received a sentence of life imprisonment. He reiterated he would automatically impose a life sentence, and would not consider the death penalty, in a case such as this one where there was a single victim. Mr. Jackson could only consider the death penalty in a situation where there was more than one victim.[207]

The state raised a cause challenge to Mr. Jackson, stating he would be substantially impaired as a juror due to his inability to consider capital punishment in this case.[208] After listening to the defense's argument, the trial court ruled:

> With regard to Juror No. 31-262, Mr. Jackson, the Court finds there was no ambiguity with regard to his position. He is opposed to death and believes life is as severe, and in many cases worse, and would want the person to consider their actions on a day-by-day basis for the rest of their lives. When questioned as to whether he could consider death, he indicated only in mass murder situations, genocide, multiple murder. The case in the bill of indictment has previously been read. It is obvious that this is a single situation. Drawn to similarities to the death of his sister, he indicated that in no way in a single murder case could he impose death, it would always be life. The Court finds a serious impairment to being able to be an impartial juror, and, therefore, would have to accept the State's challenge for cause and excuse Mr. Jackson.

The record undeniably supports the trial court's conclusion that this prospective juror's views on the death penalty prevented or substantially impaired him in the performance of his duties as a juror in accordance with his instructions or oaths. Mr. Jackson maintained his inability to consider the imposition of capital punishment where there was a single victim throughout his voir dire testimony. There was no abuse of the trial court's discretion in granting the state's cause challenge to this prospective juror.

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[207] Vol. 29, p. 7049-7053.

[208] Vol. 29, p. 7065.

Shiquita Briggs

The defendant asserts the trial court improperly granted the state's challenge for cause for prospective juror Shiquita Briggs. According to the defendant, Ms. Briggs did not oppose the death penalty and could consider the death penalty in this case.

When speaking with the prosecutor, Ms. Briggs agreed with her questionnaire response that she was generally in favor of the death penalty but could put that feeling aside and return with a different sentence.[209] She indicated also that, in cases of rape and murder of a child, she would always vote to impose the death penalty. She clarified to state she could keep an open mind.[210] Ms. Briggs stated she would have no problem determining guilt or innocence, would keep an open mind to any evidence presented in penalty phase, could consider any mitigating factors and give them whatever weight she thought they deserved, could be fair to both sides, and could return with a sentence of life imprisonment, if that was appropriate.[211] She then told the prosecutor she could not vote to execute the defendant if she thought the appropriate sentence was death.[212]

Ms. Briggs did not base her belief on personal or religious grounds, but that she "couldn't do it."[213] When asked if she would automatically vote for life and not vote for death, regardless of the evidence presented, she stated "vote for life."[214] She clarified she would automatically vote for life and could never see herself voting for

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[209] Vol. 30, p. 7333.

[210] *Id.*

[211] Vol. 30, p. 7334-7336.

[212] Vol. 30, p. 7337.

[213] Vol. 30, p. 7337.

[214] Vol. 30, p. 7337-7338.

a death penalty, under any circumstances.[215] Ms. Briggs answered several more times that she would only consider a life sentence, and not the death penalty, even in a worst case scenario.[216]

In response to brief defense questioning, Ms. Briggs agreed that she could consider the death penalty in some cases and responded that she would be able to consider the death penalty in this case.[217] When asked if she could not only consider the death penalty but whether she could vote for that sentence, Ms. Briggs made no response.[218] When told by defense counsel that he needed an answer and asked if this might be a case where she could not only consider the death penalty but could actually vote for it, Ms. Briggs responded: "Yes."[219]

After the prosecutor pointed out her inconsistent responses depending on who was questioning her, Ms. Briggs responded that, if selected as a juror, she could vote that the defendant be executed.[220]

The state challenged Ms. Briggs for cause, arguing she was substantially impaired due to her inability to answer consistently.[221] After listening to the defense's objection, the trial court held:

> The Court takes cognizance of the responses of Ms. Briggs, noting that in the initial questioning by the State, she indicated she could be fair to both sides and keep an open mind. When asked if she could give life, she said, "Yes;" asked if she could give death, and said, "No." Would she automatically give life if given a choice? She said, "Yes." Asked if she would give death under any circumstances. She said, "No." Then asked under this specific case, would you give - - could you not

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[215] Vol. 30, p. 7338-7339.

[216] Vol. 30, p. 7339-7340.

[217] Vol. 30, p. 7416-7417.

[218] Vol. 30, p. 7417.

[219] *Id.*

[220] Vol. 30, p. 7458-7460.

[221] Vol. 30, p. 7466-7467.

> give the death penalty" "Probably." Then qualified it, "No death, only life." Followed up by the Defense, she could consider death in some cases. "Yes, could impose a death penalty." In conjunction, being questioned again by the State, said, "Yes, she could give death."
>
> The Court also recalls that she came into the jury room with regard to some prior proceedings. She came in when the Court specifically asked for hardship and publication issues. She had neither a publication issue nor a hardship, and did not seem to understand the process. She has continued to demonstrate an inability to grasp the concepts of a very serious matter. The Court is concerned of [sic] competency. Her answers are consistent with competency [sic], or lack thereof.
>
> The Court would grant the State's challenge for cause and excuse her, finding that she has a serious impairment to serve as a juror in a case of this magnitude.[222]

This court has previously held that "[t]he trial judge is in the best position to determine whether a prospective juror is substantially impaired." *Leger*, 2005-0011 p. 77, 936 So.2d at 162. As opposed to our review of a cold record, the trial judge is in a superior position to not only hear a prospective juror's responses, but to make a "first-hand observation of tone of voice, body language, facial expression, eye contact, or juror attention" to which much deference must be given. *Leger*, 2005-0011 p. 90, 936 So.2d at 169. Coupling our deference to the trial court's observations of Ms. Briggs during other parts of voir dire, as well as her individual voir dire questioning, with our own review of the record, which does not contradict the trial court's finding of her inconsistent responses, we find there was no abuse of the trial court's discretion in finding Ms. Briggs was substantially impaired as a juror and in granting the state's challenge for cause.

Isaac Clark

The defendant argues the trial court improperly granted a state challenge for cause for prospective juror, Isaac Clark. According to the defendant, although Mr.

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[222] Vol. 30, p. 7469-7470.

Clark stated there would be significant family pressure opposing his own views, he did not categorically oppose the death penalty.

During the state's questioning, Mr. Clark affirmed he had checked on his questionnaire that he was generally in favor of the death penalty but could put those feelings aside if he thought it was appropriate.[223] Although he would have no problem with determining guilt or innocence, Mr. Clark told the prosecutor he believed he would have a problem with making a determination as to penalty.[224] When invited by the prosecutor to explain his answer, Mr. Clark answered:

> Well, I do not feel that, as you were asking some of the other questions, that I could honestly consider myself a fair - - a fair and impartial juror in that particular instance [of determining penalty].[225]

When asked to explain further, Mr. Clark stated that, although he was not very religious, his family was very religious and his immediate family was extremely "anti-death penalty."[226] He explained that he was told on a regular basis that believing in the death penalty was wrong, and that only God can make that kind of decision.[227]

> I, myself, have my own views on it per se, but I can't sit here and say that those kind of discussions wouldn't have an effect on my judgment in any way - - in no way at all. I believe that there would be some effect in my judgment just on the case of my upbringing.[228]

Although Mr. Clark believed the death penalty could be warranted in very extreme circumstances, as an individual, he stated: "I don't feel that I could fairly and completely impartially decide on that subject."[229] The following colloquy

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[223] Vol. 30, p. 7345.

[224] Vol. 30, p. 7346.

[225] *Id.*

[226] Vol. 30, p. 7346-7347.

[227] Vol. 30, p. 7347.

[228] Vol. 30, p. 7347.

[229] Vol. 30, p. 7348.

summarized Mr. Clark's beliefs:

Prosecutor: All right. And what you're saying to me is that even if you thought death was the appropriate sentence, because of your family beliefs, or how deep they are, what you've been told over the years, that you could not return with the death penalty because of that?

Mr. Clark: It would be very conflicting and difficult, yes.

Prosecutor: All right. Well, conflicting and difficult are one thing, - -

Mr. Clark: Right.

Prosecutor: - - but can you do it or not do it is another thing, and only you know that.

Mr. Clark: I honestly am not sure if I could or not.

Prosecutor: Okay. So, if the State proves its case beyond a reasonable doubt, and you've listened to the penalty phase, and you feel that the death sentence would be the appropriate penalty, would you be able to vote that way, or are you saying that you don't know if you could vote that way?

Mr. Clark: I don't know if I could vote that way.

Prosecutor: Even if - - even if you felt that was the appropriate sentence, you could very well not vote for that sentence; is that correct?

Mr. Clark: Correct.

Prosecutor: Okay. But it's not based on your personal, religious beliefs, or anything of that sort; is that correct?

Mr. Clark: Not personally, no.

Prosecutor: Okay. Thank you, Mr. Clark.[230]

In extremely brief questioning, defense counsel obtained Mr. Clark's acknowledgment that he would have to decide the case for himself and that, under the appropriate circumstances, he could consider the death penalty.[231]

In further questioning by the state, Mr. Clark stated that anti-death penalty

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[230] Vol. 30, p. 7348-7350.

[231] Vol. 30, p. 7450.

pressure from his family would affect his decision to vote for the death penalty.[232] However, with that understanding, if he felt the death penalty was the appropriate punishment, he believed he could vote to impose the death penalty in this case.[233]

The state raised a cause challenge to Mr. Clark, arguing he would have a problem being a fair and impartial juror.[234] After listening to the defense's argument against the challenge, the trial judge ruled:

> With regard to Juror No. 32-39, Mr. Isaac Clark, the Court has reviewed his responses, specifically from the State, noting that his family was very anti-death, while he did indicate he had independent views from his family, that the conflict of his views with the family causes serious turmoil internally. With regard to guilt, he had no problem in making those decisions. Penalty - - when asked about life or death, said he probably couldn't be fair. When specifically asked about giving the death penalty, "Not sure that he could impose it." In and of itself, the Court might find the totality such that he only leans toward life. But also the Court would take cognizance of obvious anxiety that Mr. Clark had in responding to these questions. The turmoil that he expressed orally was also visibly on him, in having to make the decision that he could consider death. The tone and the expression of his voice is noted by the Court, and the hesitancy of his responses, the Court would conclude, in the totality of his responses, that he does suffer an impairment with regard to being impartial, and, therefore, would excuse Mr. Clark for cause on the State's motion.[235]

As previously stated, "[t]he trial judge is in the best position to determine whether a prospective juror is substantially impaired." *Leger*, 2005-0011 p. 77, 936 So.2d at 162. As opposed to our review of a cold record, the trial judge is in a superior position to not only hear a prospective juror's responses, but to make a "first-hand observation of tone of voice, body language, facial expression, eye contact, or juror attention" to which much deference must be given. *Leger*, 2005-0011 p. 90, 936 So.2d at 169. We note that Mr. Clark himself raised the issue of his impairment

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[232] Vol. 30, p. 7465.

[233] Vol. 30, p. 7465-7466.

[234] Vol. 30, p. 7475-7476.

[235] Vol. 30, p. 7477-7478.

during questioning and that he candidly informed the court of his belief that he would be unable to be a fair and impartial juror. Coupling our deference to the trial court's observations of Mr. Clark with his voir dire responses, we hold there was no abuse of the trial court's discretion in finding Mr. Clark was substantially impaired as a juror and in granting the state's challenge for cause.

4. Improper Double Standard

The defendant complains that the trial court employed a double standard favoring the state in ruling on challenges throughout voir dire and in deciding when to attempt rehabilitation of prospective jurors. The defendant argues the trial court attempted to rehabilitate eleven prospective jurors who indicated that they would always impose the death penalty or would always impose the death penalty on the facts of this case, but would not attempt to rehabilitate twelve prospective jurors who indicated a general or moral opposition to the death penalty.[236] The defendant asserts this alleged double standard favoring the state violated his right to an impartial jury, to due process and to reliable capital sentencing.

As an initial matter, we note that the conduct and scope of voir dire lies within the sound discretion of the trial court, whose rulings will not be disturbed absent an abuse of discretion. La. C.Cr.P. art. 786; *State v. Hall*, 616 So.2d 664, 668-669 (La. 1993). Here, the trial judge gave an initial instruction to the prospective jurors on general matters. The trial judge also made a preliminary inquiry into whether prospective jurors had been exposed to pretrial publicity and whether they were able to consider both life imprisonment and death as penalties.

Our review of the record shows there is absolutely no merit to the defendant's assertions of an improper double standard or a pro-state bias. Some of the allegations

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[236] *See* Appellant's Brief, p. 53, n. 94 and 95.

of state-biased rehabilitation cited in the defendant's brief are, in fact, citations to the trial court's preliminary instruction and questioning, which occurred before the involvement of either the state or the defense.[237] Some of the record citations have nothing to do with the issue alleged or fail to correspond with the prospective juror named by the defense.[238] Other instances cited as an example of bias for the state show additional questioning by the trial court prompted by a combination of juror confusion over the issues discussed, conflicting responses by the prospective jurors and/or confusing voir dire instructions.[239] No negative connotation of bias should attach to a trial judge who seeks to ensure a thorough and comprehensive voir dire inquiry.

Similarly, there is no merit to the defendant's allegation that the trial court would not attempt to rehabilitate twelve prospective jurors who indicated a general or moral opposition to the death penalty. Six of the twelve prospective jurors named by the defense have been previously discussed with regard to other voir dire issues, and need not be further reviewed.[240] The voir dire record of four more of those prospective jurors raised by the defense in support of their argument so clearly showed their impairment as jurors that they were either removed by a joint challenge

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[237] *See* Vol. 25, 6144 (prospective juror Don Fontaine); Vol. 26, p. 6303, 6315 (prospective juror Eric Waites); Vol. 26, p. 6317 (prospective juror Steven Hargroder).

[238] *See* Vol. 24, p. 5976 (court was actually helping defense counsel with questioning of difficult prospective juror Debbie Landry); Vol. 25, p. 6018 (citation for prospective juror Daniel Norton is incorrect; this portion of the transcript shows trial court's additional questioning of prospective juror Dorothy Rissler); Vol. 25, p. 6099 (citation for prospective juror Thomas Vasta is incorrect; this portion of the transcript contains the trial court's reasons for ruling on a defense motion for mistrial).

[239] *See* Vol. 25, p. 6021 (prospective juror Ronnie Todd); Vol. 25, p. 6022 (prospective juror Charlotte Smith); Vol. 28, p. 6882, 6883 (prospective jurors Ivy Sanford, Patricia Bonnette and Sammie Dunn--called back for re-questioning after trial court noted error in questioning of prior panel, discussed *supra*).

[240] *See* the prior discussions regarding prospective jurors Kimberleigh Harris, Derick Daniels, Jessica Bates, Shawn Jackson, Shiquita Briggs and Isaac Clark. As the prior discussions show, additional questioning of these jurors was conducted, either by the court or by counsel.

for cause, or the defense did not oppose their removal on a state challenge for cause.[241]

The remaining two prospective jurors named by the defense fail to support its argument of bias. Prospective juror Diana Charles was not additionally questioned by the court. However, the trial court allowed both the state and the defendant to additionally question her; defense counsel refused the opportunity and failed to ask her follow-up questions.[242] Neither the state nor the defense challenged her for cause after the *Witherspoon* evaluation.[243] Ultimately, the state expended its seventh peremptory challenge to remove her from the venire.[244] The other prospective juror, Lee Diamond, informed defense counsel during voir dire that he had hearing and speaking problems which would prevent him from serving on the jury.[245] Nevertheless, he survived *Witherspoon* questioning and no cause challenge was brought against him by either the state or the defense.[246] After general voir dire questioning, the trial court denied a state challenge for cause based on his hearing problems.[247] Subsequently, the state exercised its sixth peremptory challenge to remove Lee Diamond from the venire.[248] We fail to see how either of these prospective jurors supports the defendant's argument of pro-state bias.

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[241] *See* prospective juror Samuel Morgan, Vol. 21, 5036 and Vol. 22, p. 5424 (joint challenge); prospective juror Ms. Cleatter Moore, Vol. 22, p. 5421-5422 (defense would not oppose state's cause challenge); prospective juror Caroline Hutchinson, Vol. 24, 5862 (same); prospective juror Mrinal Desai, Vol. 24, p. 5839-5840 (same).

[242] *See* prospective juror Diana Charles, Vol. 22, p. 5414.

[243] Vol. 22, p. 5421.

[244] Vol. 35, p. 8675-8676.

[245] *See* prospective juror Lee Diamond, Vol. 22, p. 5383-5384.

[246] Vol. 22, p. 5421.

[247] Vol. 35, p. 8663-8667.

[248] Vol. 35, p. 8675.

At all times throughout voir dire, we find that the trial judge's decisions and demeanor were above reproach, highly professional, and even-handed to both the prosecution and the defense. There is no question that the defendant's rights to an impartial jury, to due process, or to reliable capital sentencing were preserved.

5. Curtailed Voir Dire

The defendant contends the trial court unconstitutionally curtailed the voir dire of defense counsel, limiting counsel's ability to exercise peremptory strikes and challenge jurors for cause.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination. La. Const. art I, § 17. The purpose of voir dire is to determine the qualifications of prospective jurors by testing their competency and impartiality and to assist counsel in articulating intelligent reasons for exercise of cause and peremptory challenges. *State v. Ball*, 2000-2277 p. 23 (La. 1/25/02), 824 So.2d 1089, 1110, *cert. denied*, 537 U.S. 864, 123 S.Ct. 260, 154 L.Ed.2d 107 (2002). This Court has held that the accused's right to exercise his challenges intelligently may not be curtailed by the exclusion of non-repetitious voir dire questions which reasonably explore the juror's potential prejudices, predispositions or misunderstandings relevant to the central issues of the case. *State v. Duplessis*, 457 So.2d 604, 606 (La. 1984), *citing State v. Monroe*, 329 So.2d 193 (La. 1975).

However, a trial judge in a criminal case has the discretion to limit voir dire examination, as long as the limitation is not so restrictive as to deprive defense counsel of a reasonable opportunity to probe to determine a basis for challenges for cause and for the intelligent exercise of peremptory challenges. *State v. Williams*, 457 So.2d 610 (La. 1984). Therefore, when the defendant asserts that he has been deprived of his constitutional right to a full and fair voir dire examination, the

reviewing court must examine the entire voir dire in order to determine that issue. Restrictions on counsel's necessarily repetitive questions aimed at eliciting those attitudes towards legal principles which will play a significant role at trial require close scrutiny and invite reversal. *See Hall, supra*; *Duplessis, supra*.

Nevertheless, voir dire does not encompass unlimited inquiry by a defendant into all possible prejudices of prospective jurors, including their opinions on evidence, or its weight, hypothetical questions, or questions of law that call for any prejudgment of supposed facts in the case. Louisiana law clearly establishes that a party interviewing a prospective juror may not ask a question or pose a hypothetical which would demand a commitment or pre-judgment from the juror or which would pry into the juror's opinions about issues to be resolved in the case. "It is not proper for counsel to interrogate prospective jurors concerning their reaction to evidence which might be received at trial." *Ball*, 2000-2277 p. 23, 824 So.2d at 1110.

We initially note that, despite the defendant's assertion that voir dire was somehow curtailed, the voir dire of the jury in this criminal matter is contained in nearly twenty volumes of the transcript.[249] The defendant claims counsel was prevented from ascertaining prospective jurors' views on the death penalty and mitigation evidence. Our review of the entire record of voir dire questioning does not support this allegation, nor do the portions of the record cited by the defendant in support of this claim. Rather, the cited portions illustrate how defense counsel attempted to obtain an improper commitment or a pre-judgment from the prospective jurors regarding evidence or its lack,[250] or show only the arguments of counsel and

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[249] *See* Vol. 18-Vol. 37.

[250] *See ex.* Vol. 36, p. 8943. The trial court admonished defense counsel after a state objection: "Now you've crossed the line. ... No, it's very fact specific, not just a general application or testing and evaluation, but fact specific as to specific evidentiary matters that are going to be propounded to the jurors and then carrying it on to their decision as to the ultimate issue. At this point I would sustain the objection which was indicated to be ongoing, you've crossed the line."

the court's ruling on objections.[251] We find the district court was vigilant in enforcing the rules of proper voir dire, but otherwise allowed the defense full voir dire under the law. This assignment of error lacks merit.

6. Tainting of Juror Panel

The defendant contends the trial court erroneously refused to grant a defense motion for a mistrial during voir dire. The motion was based upon the defense claim that the jury pool had been tainted with the information that Reeves had previously been tried and the earlier trial had ended in a mistrial. He also claims the trial court erroneously refused to grant his cause challenge to prospective juror Michael Schafer on this basis.

The record shows that the bill of indictment was read to the prospective jurors in order to determine if anyone knew anything about the case.[252] Prospective juror Michael Schafer indicated he knew about the case, but before he could say anything that was recorded by the court reporter, the trial court instructed him not to talk in open court about what he knew.[253] In individual questioning outside the presence of the venire, Mr. Schafer told the court he had read a newspaper article within the previous month that reported the defendant's first trial had ended in a mistrial due to "some juror's position on the death penalty."[254] Mr. Schafer remembered the article mentioning something about a trailer park and a cemetery as the location of the

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[251] *See* Vol. 25, p. 6044 (state objection sustained when defense counsel questioning sought commitment on a specific situation), 6051 (error in citation, however, if the defendant means to refer to p. 6091, 6091-99 encompasses counsel's argument and court's ruling on a motion for mistrial raised by defense on this issue); Vol. 32, p.7905-7910 (counsels' argument and court's ruling on state objection after defense counsel questioning sought commitment).

[252] Vol. 23, p. 5501.

[253] Vol. 23, p. 5502.

[254] Vol. 23, p. 5517.

crime.[255] That information did not cause him to form an opinion about the matter, and he accepted the trial court's instruction that his verdict could only be based on the evidence developed at trial.[256] The information he had read would not affect his ability to be a fair and impartial juror.[257]

The state had no questions for Mr. Schafer but defense counsel asked whether Mr. Schafer's understanding that a mistrial had occurred would in any way affect his ability to deliberate as a juror in the case. Mr. Schafer replied: "I don't see how, no, sir. All I have is the knowledge that somebody caused a problem in the previous trial. ... But my beliefs don't necessarily coincide with that person's belief."[258] When defense counsel focused on Mr. Schafer's characterization of the cause of the mistrial as a "problem," Mr. Schafer explained: "Well, if a - - if a - - if there's an attempt to have a trial and it's not - - and it has to be declared a mistrial, apparently there was a problem. And from my understanding of the article a juror was the problem."[259] Mr. Schafer admitted he may have been in error, stating "... Now maybe I didn't understand it [the newspaper article] correctly."[260]

The prosecutor asked Mr. Schafer, even assuming the case Mr. Schafer read about in the newspaper was the same case that was now being tried, whether that would affect his ability to serve as a fair and impartial juror in a totally new trial. Mr. Schafer stated: "I don't think that would affect me."[261]

Thereafter, the defense raised a cause challenge to Mr. Schafer, based on his

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[255] *Id.*

[256] Vol. 23, p. 5517-5518.

[257] Vol. 23, p. 5518.

[258] Vol. 23, p. 5520-5521.

[259] Vol. 23, p. 5521.

[260] Vol. 23, p. 5521.

[261] Vol. 23, p. 5522.

knowledge of the case and his perception that a juror in the previous case caused a problem.[262] The trial court denied the cause challenge, finding:

> The Court's notes clearly reflect that when questioned about the publicity that he has not formed any preconceived ideas; believes in the presumption of innocence; did indicate he would render a fair and impartial verdict if called upon and further would base only his decision, evidence that was presented in the court. For those reasons the Court would deny the challenge for cause as to publicity as to Mr. Schafer.[263]

The defense subsequently used their fifth peremptory challenge to remove Mr. Schafer from the venire.[264]

Although not raised in the section regarding the denial of other defense cause challenges, which were based on the prospective jurors' views on capital punishment, we apply the same standards of review to this cause challenge based on publicity. The record clearly supports the trial court's conclusions in the denial of this cause challenge. "A defendant is not entitled to a jury entirely ignorant of his case and cannot prevail [on a motion for change of venue] merely by showing a general level of public awareness about the crime." *Manning*, 2003-1982 p. 9, 885 So.2d at 1063. Here, Mr. Schafer stated he would be fair and impartial. He told the court that nothing he remembered from the newspaper article would affect his ultimate decision as a juror, which would be based exclusively on evidence presented during a trial. The trial judge did not abuse his discretion in denying the defense's cause challenge to this prospective juror.

With regard to the facts underlying the motion for mistrial, the record shows that the prospective juror who was individually questioned after Mr. Schafer about

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[262] Vol. 23, p. 5613.

[263] Vol. 23, p. 5614.

[264] Vol. 35, p. 8673.

pre-trial publicity was James Pierson.[265] Mr. Pierson related that he, too, read a newspaper article earlier in the week and that he had heard Mr. Schafer mention the prior mistrial in the courtroom:

Court:	Let me ask you something, you made a comment, you said when I got here and the guy said something of a mistrial.
Mr. Pierson:	The first guy that stood up and said he did have information about the case, and he said it was a mistrial and I remembered reading that - -
Court:	When was that? This morning?
Mr. Pierson:	This morning, yeah.
Court:	And who said that?
Mr. Pierson:	The very first person that stood up.
Court:	You were sitting close to him?
Mr. Pierson:	I was sitting behind him, to the right.[266]

In response to questioning, Mr. Pierson stated that the information would not affect his impartiality.[267]

Thereafter, the defense moved for a mistrial (or, as an alternative, to excuse the entire panel), contending that Mr. Schafer had tainted all of the prospective jurors who were present in the courtroom when he made his comment.[268] After listening to the state's objection, the trial court stated:

> [Defense counsel], first of all, I would indicate that the Court did not hear anything with regard to a statement that was made by Mr. Schafer, but apparently one was made, because Mr. Pierson said that he heard it. Mr. Pierson said that he was sitting directly behind Mr. Schafer and off to his right. I don't even believe that the Defense team heard it in court

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[265] Vol. 23, p. 5523.

[266] Vol. 23, p. 5525.

[267] Vol. 23, p. 5526.

[268] Vol. 23, p. 5530-5532.

> because nothing was said until Mr. Pierson indicated it here in these proceedings. At this time I haven't seen any prejudice. Mr. Pierson is the only one that we know of that overheard it at this point; clearly indicated it had no effect on him. I haven't seen any prejudice, but, again, we've got a number of people out there that we're going to interview, and the Court is going to review whatever remedies and what the law is with regard to it. I will reserve - - or preserve your request at this time and we will continue on to direct our questions to the pre-trial publicity individuals and I would ask that if you have some case law or statutory law that you review that in the interim to support your position and let the State likewise review information to counter it if they disagree with your position. The Court will take an independent evaluation on its own.[269]

The other prospective jurors from the panel who had indicated they knew something about the case were then individually interviewed regarding pre-trial publicity. None of them mentioned overhearing Mr. Schafer's comment.[270]

After ruling on the cause challenges for pre-trial publicity for this panel, the trial court re-visited the issue of the defendant's motion for a mistrial based on Mr.Schafer's comment.[271] After hearing argument, the trial court placed on the record the factual basis for how the motion arose and how the issue was brought to the court's attention by Mr. Pierson. The court indicated that every juror who had come forward was questioned about comments overheard or contact with the media. The trial court then ruled:

> It is the Court's position at this time that the mistrial will be denied, the motion will be denied. The Court as to each group that will be sitting in the 14 seats for *Witherspoon* qualification, the Court will ask a specific question, indicating that it's quite common during these cases while they're pending to come across something, overhear something, either in the courtroom outside the courtroom, in the elevator, that could be pertinent and will ask if that has, in fact, occurred as to each of those panels. If there are any positive responses, the Defense will have the opportunity to question them as to the specifics of those responses. If they answer in the negative, then the Court is satisfied that they have not overheard specifically, gearing them toward something that would have

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[269] Vol. 23, p. 5533-5534.

[270] *See* Vol. 23, p. 5631 (portion of trial court's ruling).

[271] Vol. 23, p. 5625.

> been overheard in court which the court finds if any heard were a very limited number of individuals. It is also noted that most of the media that has occurred also references the fact that this case was a mistrial earlier on and while many disagree on many of the facts, the persons that have been exposed to the media have referenced some type of retrial or mistrial, and that that does not affect their ability to serve as a juror up to this point.[272]

In brief, the defendant argues that the inclusion of jurors who overheard Mr. Schafer's comment violated his right to a fair trial and presumption of innocence. Interestingly, the defense never challenged Mr. Pierson, who was the only prospective juror who reported overhearing this comment.[273]

A similar incident occurred in *State v. Weary*, 2003-3067 (La. 4/24/06), 931 So.2d 297, *cert. denied*, 549 U.S. 1062, 127 S.Ct. 682, 166 L.Ed.2d 531 (2006), where one member of a voir dire panel announced before the entire group that he would vote guilty based on what he had heard in the media. Counsel for Weary moved for a mistrial or asked that the entire panel be struck, arguing they could not remain impartial after hearing the comment of the other prospective juror. This Court found no abuse of the trial court's discretion in denying the defense motion for mistrial under the law:

> La.C.Cr.P. art. 775 states in part that a defendant's motion for mistrial shall be ordered "when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial." The "prejudicial conduct" may include remarks of veniremen during voir dire. *State v. Carmouche*, 2001-0405 p. 20 (La.5/14/02), 872 So.2d 1020, 1035. However, mistrial is a drastic remedy that is warranted only when the defendant has suffered substantial prejudice such that he cannot receive a fair trial. *Carmouche*, 2001-0405 p. 20, 872 So.2d at 1035; *State v. Wessinger*, 1998-1234 p. 24 (La.5/28/99), 736 So.2d 162, 183, *cert. denied*, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999). "A trial court need not order a new trial [or dismiss a jury panel] absent a showing that comments made by a prospective juror affected other jurors or prejudiced the defendant." *Carmouche*, 2001-0405 p. 20, 872 So.2d at 1035; *State v. Cushenberry*, 407 So.2d 700, 701-702 (La.1981); *State v. Hutto*, 349 So.2d 318, 320 (La.1977). The

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[272] Vol. 23, p. 5632-5633.

[273] Vol. 23, p. 5615.

> determination of whether actual prejudice has occurred lies within the sound discretion of the trial judge; this decision will not be overturned on appeal absent an abuse of that discretion. *Carmouche*, 2001-0405 p. 20, 872 So.2d at 1035; *Wessinger*, 98-1234 p. 24, 736 So.2d at 183. In deciding the correctness of the trial court's voir dire rulings, a reviewing court considers the entirety of the voir dire record. *Carmouche*, 2001-0405 p. 20, 872 So.2d at 1035; *State v. Hall*, 616 So.2d 664, 669 (La.1993).

Weary, 2003-3067 p.36, 931 So.2d at 321.

Similarly, here we find no abuse of discretion in the trial court's denial of the defendant's motion for mistrial on this basis. None of the other prospective jurors in the same panel who claimed to know anything about the case mentioned hearing Mr. Schafer's statement when interviewed individually. The trial court, in fact, instructed the *Witherspoon* panels regarding comments they may hear in the courthouse.[274] The record indicates that nothing further was ever raised regarding this issue. In light of these factors, we are convinced that the comment of Mr. Schafer did not affect other prospective jurors or prejudice the defendant. We hold that there was no abuse in the trial court's ruling denying the motion for mistrial on this basis.

7. *Batson* Issue

The defendant argues that the prosecutor improperly struck prospective jurors on the basis of their race. Specifically, the defendant claims the trial judge failed to apply the proper standard under *Batson v.Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), in finding that no *prima facie* case of discrimination arose from the prosecutor's use of peremptory challenges to excuse prospective jurors from the venire. In the alternative, the defendant seeks a remand for a hearing on the matter, at which time the prosecutor would have to state race neutral reasons for the challenges.

In *Batson*, the Supreme Court held that an equal protection violation

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[274] *See ex.* Vol. 23, p. 5661.

> occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. The Supreme Court reaffirmed its position that racial discrimination by any state in jury selection offends the Equal Protection clause of the 14th Amendment in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Louisiana law codifies the *Batson* ruling in LSA-C.Cr.P. art. 795.

State v. Anderson, 2006-2987 p. 41-42 (La. 9/9/08), 996 So.2d 973, 1004, *cert. denied*, __U.S.__, 2009 WL 210493 (2009); *see* La. C.Cr.P. art. 795.[275] The three-step *Batson* process has recently been described again by the Supreme Court as follows:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves

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[275] La. C.Cr.P. art. 795 provides in pertinent part:

Art. 795. Time for challenges; method; peremptory challenges based on race or gender; restrictions

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C. No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory race or gender neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

D. The court shall allow to stand each peremptory challenge exercised for a race or gender neutral reason either apparent from the examination or disclosed by counsel when required by the court. The provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror.

E. The court shall allow to stand each peremptory challenge for which a satisfactory racially neutral or gender neutral reason is given. Those jurors who have been peremptorily challenged and for whom no satisfactory racially neutral or gender neutral reason is apparent or given may be ordered returned to the panel, or the court may take such other corrective action as it deems appropriate under the circumstances. The court shall make specific findings regarding each such challenge.

> evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Internal quotations and citations omitted.]

Rice v. Collins, 546 U.S. 333, 338, 126 S.Ct. 969, 973-974, 163 L.Ed.2d 824 (2006). The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal. *State v. Juniors*, 2003-2425 p. 28 (La.6/29/05), 915 So.2d 291, 316, *cert. denied*, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006).

The record in this case shows that after the 12-member jury was selected, and the first alternate juror was selected, the defense raised an objection to the state's previous use of peremptory challenges on the basis of *Batson*.[276] The trial court initially questioned the timing of the objection, noting that no *Batson* challenge had been raised until the jury was fully constituted and the court was involved in the selection of alternate jurors, but conceded that the defense could raise a *Batson* challenge until the jurors were sworn.[277]

As support for its *prima facie* showing, the defense raised only the fact that the state used more peremptory challenges against black prospective jurors then white. The record shows the state used seven of its peremptory challenges against black prospective jurors and five of its peremptory challenges against white prospective jurors.[278] Ultimately, the trial court ruled that the defense failed in the first step of the *Batson* analysis, in that the defense failed to make a *prima facie* showing of discrimination.[279]

The Supreme Court's clarification of the first step of the *Batson* analysis was

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[276] Vol. 37, p. 9028.

[277] Vol. 37, p. 9029-9031.

[278] Vol. 37, p. 9032.

[279] Vol. 37, p. 9042-9043.

noted in *State v. Draughn*, 2005-1825 p. 24 (La. 1/17/07), 950 So.2d 583, 602, *cert. denied*, __U.S.__, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007):

> *Johnson* reiterated that "a *prima facie* case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'", 545 U.S. at 169, 125 S.Ct. 2410, *citing Batson*, 476 U.S. at 94, 106 S.Ct. at 1712. In *Johnson*, the Supreme Court quoted *Batson*'s explanation of what constitutes a *prima facie* case:
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> > [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. *Id.*, at 96, 106 S.Ct. 1712 (citations omitted) (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244 (1953)).
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> *Johnson*, 545 U.S. at 169, 125 S.Ct. 2410.

As previously stated, counsel for Reeves did nothing more than point out that seven black prospective jurors were excused on state peremptory challenges and five white prospective jurors were excused on state peremptory challenges. Other than point out that the responses of some of the persons excused appeared to be neutral, the defense offered no other relevant evidence that would support an inference of discrimination. At trial, the prosecution countered that the defense struck 11 white prospective jurors with peremptory challenges and removed only 1 black prospective challenge with a peremptory challenge. On appeal, the defense makes a statistical argument urging that the prosecution's use of peremptory challenges was racially

discriminatory.

"*Johnson* makes clear that the burden *of production* in the first *Batson* step is squarely on the defendant." *Draughn*, 2005-1825 p. 26, 950 So.2d at 603 (emphasis in original). As in *Draughn*, where the "mere invocation of *Batson*" was made when black prospective jurors were peremptorily challenged, "[w]ithout further argument or reasons presented by the defense under the circumstances of this case, the trial judge had nothing from which to draw an inference of purposeful discrimination." *Id.* Instead, the trial court had several relevant circumstances which negated a finding of discriminatory intent on the part of the prosecution in exercising its peremptory challenges.

First, the case itself presented no overt racial overtones. The defendant is white, as was his victim.[280] Second, the trial court properly considered the timing of the defense objection. Although the objection was timely under our law in the sense that a *Batson* challenge is timely until the entire jury panel has been sworn together, this circumstance contrasts sharply with the situation in other cases where a defense attorney raises an objection immediately after a prospective juror is challenged and gives reasons.[281] Third, the trial judge could and did take into consideration the overall tenor of the voir dire questioning. Our review shows that the prosecution used the same questions throughout its voir dire. There is no indication that any particular prospective jurors were "targeted" for questioning in any way. Fourth, the record shows that the ultimate make-up of the jury which considered this case was composed

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[280] *Compare with Johnson*, 545 U.S. at 164, 125 S.Ct. 2410, where Johnson, a black male, was convicted of second-degree murder and assault on a white 19-month old child, resulting in death.

[281] *See State v. Williams*, 524 So.2d 746 (La. 1988) (*Batson* objection timely if made "before the entire jury panel is sworn").

of five black jurors and seven white jurors.[282] "Although the mere presence of African American jurors does not necessarily defeat a *Batson* claim, the unanimity requirement of a capital case sentencing recommendation may be considered." *State v. Tart*, 1993-0772 p. 18 (La. 2/9/96), 672 So.2d 116, 141, *cert. denied*, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996). Finally, the trial judge indicated clearly he found no discriminatory intent whatsoever.[283] Here, the trial judge found: "Just numerically the ratio of the existing jury is higher than that of the entire panel, showing that if anything there was a propensity to be more minority-oriented than less minority-oriented."[284] An analysis of the voir dire as a whole convinces us that the trial judge was correct in his determination that no *prima facie* showing of purposeful racial discrimination was met by the defense in its *Batson* objection.

TRIAL ISSUES

Assignments of Error 8-11
Denial of Motion for Mistrial--Other Crimes Evidence

The defendant argues that one of his videotaped statements was improperly redacted, resulting in the impermissible admission of other crimes evidence and references being played for the jury, to his prejudice. The defendant asserts the trial court abused its discretion in denying his motion for mistrial based on the introduction of impermissible other crimes evidence during his trial.

The record shows that the videotaped statements obtained from the defendant by the police included some comments where the police and the defendant discussed his sexual proclivities toward younger girls and boys. Prior to the first trial, the state was ordered to redact those sections from the videotapes by a court of appeal ruling,

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[282] Vol. 37, p. 9034.

[283] *Compare with Johnson*, 545 U.S. at 165, 125 S.Ct. 2410.

[284] Vol. 37, p. 9034.

finding the statements were not relevant. In addition to these statements, the court of appeal ordered that references to the man-trailing dogs be removed, as the state had not given the defense adequate notice of this information.[285] After the first trial ended in a mistrial, and prior to the retrial, the state restored to the videotapes the references regarding the man-trailing dogs, since the issue of pre-trial notice was no longer applicable. In this re-editing, some of the comments regarding the defendant's sexual urges toward young children were restored to the videotape. Prior to trial, the defense was given a copy of the videotapes that were ultimately played to the jury.[286]

At trial, during the playing of the second videotape, one of the members of the prosecution team halted the videotape when she realized that comments regarding the defendant's sexual urges had been played.[287] After the jury was removed, defense counsel objected to the introduction of other crimes evidence into the trial.[288] The state and defense agreed to review the remainder of the second videotape, and to review the third videotape, to make sure that there were no other impermissible references. The jury was released for the evening, and the trial court indicated objections would be heard the next morning.[289]

The next morning, the defense moved for a mistrial under La. C.Cr.P. art. 775, arguing the jury was exposed to information they should not have heard which prejudiced his client.[290] The trial court found that the comments did not satisfy the

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[285] The record sometimes refers to these animals as "cadaver dogs," but the proper terminology is a "man-trailing dog."

[286] Vol. 39, p. 9748; Vol. 40, p. 9784.

[287] Vol. 39, p. 9737.

[288] Vol. 39, p. 9738-

[289] Vol. 39, p. 9742-

[290] Vol. 40, p. 9771-9772.

requirements for a mandatory mistrial under La. C.Cr.P. art. 770.[291] Moreover, the trial court did not find that the statements, as given, constituted other crimes evidence, disagreeing with the prior court of appeal ruling on the subject and finding the comments had increased relevancy within the greater context of the evidence adduced at trial.[292] The trial court noted that, in spite of having a copy of the videotape prior to trial, there was no pretrial defense objection to the information on the tape, and that it was the state, and not the defense, that took affirmative action to stop the tape and bring the comments to the court's attention.[293] The court also acknowledged the court would have ordered the comments redacted, out of an abundance of caution, if the court had been informed prior to trial by defense objection about them, but that the information was now disseminated to the jury.[294]

In analyzing the objected-to comments under La. C.Cr.P. art. 775, the trial court held:

> At this time the Court notes that a very small portion of what has been indicated as problematic was heard by the jury in conjunction with the entirety of the interview, which was in excess of one hour. And the Court does not feel that the defendant cannot get or obtain a fair trial at this point and would look to the jurisprudence and would be in a position to admonish if the Defense wishes that the jury be admonished.[295]

The trial court specifically found the state to have been in good faith, and that the re-inclusion of the comments to the videotape was a mistake; a finding with which the

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[291] Vol. 40, p. 9781.

[292] Vol. 40, p. 9781-9783. Since the comments describe the defendant's thoughts and feelings of sexual desire for minors, and was not a discussion of the defendant's prior actions with minors, the trial court did not find them to be evidence of other crimes.

[293] Vol. 40, p. 9784.

[294] Vol. 40, p. 9786.

[295] Vol 40, p. 9786-9787.

defense agreed.[296]

Thereafter, the state and the defense agreed that there was one comment on the third videotape which should not be shown to the jurors.[297] An agreement was reached as to the manner in which the jury would be prevented from hearing that comment, or even knowing that the comment was being kept from the jury.[298] The defense informed the trial judge that it did not wish for an admonition to be given as to the two comments which the jury heard, stating an admonition would draw more attention to the comments.[299]

The grounds for a mandatory mistrial are set forth in La. C.Cr.P. art. 770, which provides, in pertinent part, that

> a mistrial shall be ordered when a remark or comment made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to ... (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible.

We agree with the trial court that the circumstances presented here do not meet the requirements of a mistrial under Art. 770, since the objected-to comments were not made by a judge, district attorney or other court official.

However, a mistrial may be ordered under La. C.Cr.P. art. 775, upon motion of a defendant "...when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771." A mistrial may also be ordered under La. C.Cr.P. art. 771, if the trial court is satisfied that an admonition is not sufficient to assure the defendant a fair trial:

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[296] Vol 40, p. 9788-9789.

[297] Vol. 40, p. 9794-9796.

[298] The trial judge suggested that the prosecutor unobtrusively stop the videotape at the appropriate section. Then, the judge would remove the jury, explaining there was a problem with the video equipment. The videotape would be forwarded after the objectionable comment and the jury would be returned to the courtroom to hear the rest of the videotape.

[299] Vol. 40, p. 9797.

Art. 771. Admonition

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
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> ***
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> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.
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> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

We initially note the defendant's objection was not timely. The defense had been given a copy of the defendant's videotaped statements during discovery but had made no objection. The videotape was played and the comments were heard by the jury. Still, no defense objection was forthcoming. The videotape was stopped only on the affirmative action of the prosecutor. It was only subsequent to the prosecutor's actions, and the removal of the jury, that the defense raised an objection. *See State v. Broaden*, 1999-2124 p. 16-17 (La. 2/21/01), 780 So.2d 349, 361, *cert. denied*, 534 U.S. 884, 122 S.Ct. 192, 151 L.Ed.2d 135 (2001).

Even if the objection and motion for mistrial were timely, we find the complaint would fail on the merits. This court has previously dealt with the unintentional disclosure of information to a jury in *State v. Smith*, 1998-1417 p. 19 (La. 6/29/01), 793 So.2d 1199, 1211, *cert. denied*, 535 U.S. 937, 122 S.Ct. 1317, 152 L.Ed.2d 226 (2002):

> The defendant also argues that, even if the evidence was unintentionally given to the jury, the trial court's refusal to grant a mistrial was reversible error. Although defendant is correct in asserting that evidence that references an accused's commission of other crimes may result in prejudice to his substantial rights sufficient to undermine the

> fairness of trial, the trial court is charged with assessing the prejudice, and it is within the trial court's sound discretion to decide whether to grant or deny a mistrial. *State v. Edwards*, 97-1797, pp. 19-20 (La.7/2/99), 750 So.2d 893, 905-906; *State v. Connolly*, 96-1680, p. 23 (La.7/1/97), 700 So.2d 810, 824.

Mistrial is a drastic remedy and is warranted under La. C.Cr.P. art. 770, or La. C.Cr.P. art. 771, only when a remark or comment referencing an accused's commission of other crimes results in prejudice to his substantial rights sufficient to undermine the fairness of trial. *Broaden*, 1999-2124 p. 16 n.5, 780 So.2d at 360 n 5. In total, the defense objected to two series of comments which were heard by the jury. One of the instances included comments between a law enforcement officer and Reeves' indicating that, after his sister's death, Reeves started to have "problems" with, or started having an attraction toward, little boys and girls.[300] The other set of comments was the interchange during which the defendant stated that he liked to work off-shore because he could easily get rid of the sexual thoughts he had about children and was able to stay out of trouble.[301] These two brief instances of comments in the context of an hour-long videotape, which were so brief as to fail to motivate defense counsel to object, did not prejudice the defendant such that he could not receive a fair trial. We find no abuse of the trial court's discretion in denying the motion for mistrial in this circumstance.

Moreover, the erroneous introduction of other crimes evidence into a trial is subject to harmless error analysis. *State v. Johnson*, 1994-1379 p. 17-18 (La. 11/27/95), 664 So.2d 94, 101-102. Viewing these two brief statements in the context of the overwhelming evidence of guilt presented by the prosecution, we can state without doubt that the verdict actually rendered in this case was surely unattributable to the error.

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[300] Vol. 40, p. 9765. *See also* Vol. 3, p. 510 (transcript page 118, lines 24-page 119, line 25).

[301] Vol. 40, p. 9765-9766. *See also* Vol. 3, p. 517 (transcript page 126, line 10-25).

Assignment of Error 12
Denial of Motion for Mistrial—Evidence of Polygraph

The defendant asserts that his request for a mistrial was improperly denied after a state witness mentioned the defendant's polygraph examination during his direct examination. The record shows the following exchange during the state's direct examination of Detective Blanchard:

> Prosecutor: Did you know that a Jason Reeves was at the station at that time?
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> Witness: Yes, I did.
>
> Prosecutor: How did you learn that?
>
> Witness: I believe he was in the polygraph - - taking a polygraph. Excuse me.[302]

Defense counsel objected and moved for a mistrial outside the presence of the jury.[303]

The trial court found no bad faith on the part of the state. Defense counsel agreed, finding the witness's answer to have been unresponsive to the question.[304] After looking at the requirements of mistrial under La. C.Cr.P. arts. 770, 771 and 775, the trial court denied the mistrial, noting that, in the totality, he was not convinced that the statement made it impossible for the defendant to obtain a fair trial. Further, the court suggested that this would be an appropriate situation for an admonition.[305] After a short break during which the trial court reviewed jurisprudence, Judge Canaday remarked:

> It is noted at this time that the question that was asked was an unresponsive remark inadvertently received from a witness, and therefore the admonition would be proper, based on the case law that

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[302] Vol. 39, p. 9526.

[303] Vol. 39, p. 9526-9529.

[304] Vol. 39, p. 9531.

[305] Vol. 39, p. 9532-9536.

substantiates the Court's evaluation of the statutory guidelines.[306]

Although objecting to the denial of a mistrial, the defense requested that the court give the jury an admonition or instruction as soon as they were returned to the courtroom.[307] The record reflects that the trial court gave an instruction to the jury as requested by the defense.[308]

In *State v. Legrand*, 2002-1462 p. 10-11 (La. 12/3/03), 864 So.2d 89, 98, *cert. denied*, 544 U.S. 947, 125 S.Ct. 1692, 161 L.Ed.2d 523 (2005), this court held:

> This Court has long adhered to the view that lie detector or polygraph test results are inadmissible for any purpose at the trial of guilt or innocence in criminal cases. Consistent with this view, the Court has "made it clear" that the rule excluding polygraph evidence "also operates to prevent any reference during trial to the fact that a witness has taken a polygraph examination with respect to the subject matter of his testimony." *State v. Hocum*, 456 So.2d 602, 604 (La.1984); *State v. Tonubbee*, 420 So.2d 126, 132 (La.1982), *cert. denied*, 460 U.S. 1081, 103 S.Ct. 1768, 76 L.Ed.2d 342 (1983); *State v. Davis*, 407 So.2d 702, 706 (La.1981); *State v. Catanese*, 368 So.2d 975, 981 (La.1979).
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> However, "[e]ven though any reference to the results of a polygraph test would be improper, an appellate court will not automatically reverse a conviction whenever an impermissible reference to a polygraph exam is made during a criminal trial." *State v. Womack*, 592 So.2d 872, 881 (La.App. 2 Cir.1991), *writ denied*, 600 So.2d 675 (La.1992). A reversal and new trial are required only if there is a reasonable possibility that the error complained of might have contributed to the conviction. *Hocum, supra* at 604-605; *State v. Semien*, 566 So.2d 1032 (La.App. 3 Cir.1990), *writ denied*, 569 So.2d 960 (La.1990).

As previously stated, the improper comment of a witness is not grounds for a mandatory mistrial under La. C.Cr.P. art. 770, and the improper testimony of a police officer is not a comment or remark made by a judge, district attorney or court official. *State v. Givens*, 1999-3518 p. 12 (La. 1/17/01), 776 So.2d 443, 454. Instead, the

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[306] Vol. 39, p. 9540.

[307] Vol. 39, p. 9541.

[308] Vol. 39, p. 9543.

remark must be reviewed under the standards for mistrial found in La. C.Cr.P. arts. 771 or 775, where mistrial is required only when the prejudicial remark makes it impossible for the defendant to obtain a fair trial or when an admonition is not sufficient to assure the defendant a fair trial. In addition, "[w]hen the trial court is satisfied that an admonition to the jury is sufficient to protect the defendant, that is the preferred remedy. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion." *Givens*, 1999-3518 p. 12, 776 So.2d at 454.

We find no abuse of the trial court's discretion in denying a mistrial in these circumstances. Although Detective Blanchard's reference to the defendant taking a polygraph examination was improper, we do not find that this unresponsive comment was so prejudicial as to deny the defendant a fair trial.

Moreover, even if Detective Blanchard's statement was considered a trial error, the effect of the comment would be reviewed under a harmless error standard. *See Johnson*, 1994-1379 p. 17-18, 664 So.2d at 101-102. Viewed in the context of the overwhelming evidence of guilt presented by the prosecution, we can state without doubt that the verdict actually rendered in this case was surely unattributable to Detective Blanchard's unresponsive comment which mentions the defendant submitted to a polygraph examination.

Assignments of Error 13-16
Daubert Issues

After the initial trial on this matter ended in a mistrial, the state developed evidence in three additional areas to present in the re-trial. The state gave the defense pretrial notice of its intent to present evidence of a scientific nature or through expert witnesses and of its request for a pretrial determination of the admissibility of this evidence, including (1) evidence regarding the actions of a man-trailing dog in the investigation of this case; (2) expert testimony concerning fingerprints, including

expert testimony about pre-pubescent fingerprints; and (3) expert testimony concerning trace evidence examinations performed by the FBI.[309] The defense filed motions seeking to exclude this evidence.[310]

At a pretrial motion hearing held on July 19, 2004, the trial court determined that there was no necessity to submit the man-trailing dog evidence to an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as the evidence was more in the nature of a fact witness. However, both the anticipated testimony regarding pre-pubescent fingerprint evidence and trace evidence were analyzed under *Daubert* and found to be admissible. The defense now contends that the trial court erred in admitting evidence regarding the man-trailing dog without conducting a *Daubert* analysis, and in denying the defense challenges to the expert testimonies regarding pre-pubescent fingerprints and trace evidence.

The general rule for admissibility of expert testimony is set out in La.C.E. art. 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This court has held that "[t]he burden is on the party offering the putative expert. But the decision whether to reject or accept the person as an expert falls to the great discretion of the trial court, whose rulings will not be disturbed absent an abuse of that discretion. *Edwards*, 1997-1797 p. 25, 750 So.2d at 908; *see also* Official Comment (d) to Art. 702 (trial courts have broad discretion in determining who should or should not be qualified as an expert, citing 3 J. Weinstein & M. Berger,

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[309] *See* Vol. 11, p. 2641-2642, 2723-2727.

[310] *See* Vol. 11, p. 2687-2689, 2728-2730.

Weinstein's Evidence § 702[02] (1981)). Further, with regard to scientific evidence, we have held:

> With respect to scientific evidence, the trial judge acts as a gate-keeper, admitting "pertinent evidence based on scientifically valid principles" (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)), which evidence has application to the facts of the case. *Id.* at 592-93, 113 S.Ct. 2786; *State v. Quatrevingt*, [1993-1644 (La. 2/28/96),] 670 So.2d [197] at 204. The court's evaluation of the evidence must be flexible, with an eye toward reliability and relevancy. *Id.* at 595, 113 S.Ct. 2786; *State v. Foret*, 93-0246 (La.11/30/93), 628 So.2d 1116, 1122.
>
> Under *Daubert* and *Quatrevingt*, relevant factors determining whether scientific evidence is reliable include:
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> (1) The "testability" of the scientific theory or technique;
>
> (2) Whether the theory or technique has been subjected to peer review and publication;
>
> (3) The known or potential rate of error; and
>
> (4) Whether the methodology is generally accepted in the scientific community.
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> *Quatrevingt*, 670 So.2d at 204; *Daubert*, 509 U.S. at 592-95, 113 S.Ct. 2786. Scientific evidence should be admitted whenever the court's balance of the probative value and the prejudicial effect results in a determination that the evidence is reliable and helpful to the triers of fact. Admission of the scientific evidence is within the discretion of the trial judge. *Quatrevingt*, 670 So.2d at 204.

Edwards, 1997-1797 p. 25-26, 750 So.2d 909. With these legal precepts in mind, we analyze the specific evidence to which the defense objects.

Man-trailing Dog Evidence

The record shows that at the pretrial hearing the state objected to holding a *Daubert* hearing with regard to its evidence regarding the man-trailing dog used in the investigation of this matter, arguing *Daubert* testing was inappropriate for this type of evidence. The prosecutor stated that the evidence regarding the man-trailing dog was not scientific *per se*, but was instead a type of specialized knowledge which

required only the establishment of a foundation for its admissibility. The state indicated that, at trial, the state would present evidence laying a foundation for the particular dog, how the dog was trained, for what the dog was trained, and whether or not the dog acted consistently with its training, in addition to the qualifications of the handler with regard to the use of these types of specially trained dogs. The defense objected, arguing that any expert testimony was subject to a *Daubert* challenge.[311] After listening to the arguments of the prosecution and the defense, the trial court sustained the state's objection, ruling that the issue was not within the definition of a scientific inquiry. Instead, the court indicated it would look to the practical experience of the witness and general qualifications of a non-science expert in order to determine the admissibility of the evidence.[312]

At trial, the defense renewed its objection to the state's evidence regarding the man-trailing dog's contribution to the investigation, as well as the trial court's failure to hold a *Daubert* hearing on the testimony regarding the man-trailing dog. The objection, on both grounds, was once more overruled.[313] Thereafter, Mark Holmes, a detective with the Port Arthur, Texas Police Department, and the K-9 handler for the man-trailing dog which participated in the investigation of this matter, "Bo," was examined in the presence of the jury on his own training, certification, and experience, as well as on his dog's pedigree, training and experience.[314] Only after this foundation was laid did the state elicit testimony regarding their involvement in the investigation.[315]

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[311] Vol. 16, p. 3942-3953.

[312] Vol. 16, p. 3956-3957 (citations omitted).

[313] Vol. 41, p. 10016-10025.

[314] The dog's name was Marks "Bo" Diddley.

[315] *See* Vol. 41, p. 10026-10078.

Initially, we should note, Detective Holmes was never tendered as an expert witness. Rather, the state offered his testimony as a fact witness in this matter. As stated by the prosecutor: "His [Detective Holmes'] position [is] as the investigator, and the expert is the dog."[316] Although the defense disagreed with the trial court's statement that no *Daubert* hearing would have been necessary for a fact witness or investigator, the trial court wanted the record to clearly show that there was no tender as an expert for the jury to consider.[317]

In support of his contention that the district court abrogated its duty as gatekeeper of the man-trailing dog evidence under *Daubert*, the defendant refers the court to *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Even if Det. Holmes could be considered an expert witness, Reeves' reliance is misplaced. In *Kumho*, the Supreme Court makes clear that for engineers, at issue in *Kumho*, and for all non-scientist experts in general, *Daubert*'s list of factors "was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Id.*, 526 U.S. at 151, 119 S.Ct. at 1175. Rather, *Kumho* concluded that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.*, 526 U.S. at 152, 119 S.Ct. at 1176. *Kumho* declares:

> the trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable.

Id., 526 U.S. at 152, 119 S.Ct. at 1176 (emphasis in original). "Whether *Daubert's*

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[316] Vol. 41, p. 10081.

[317] *See* Vol. 41, p. 10081-10084. The trial court stated: "But inasmuch as there was no tender, there was no expertise indicated as to opinions other than a reading from the handler, there would have been no necessity for a *Daubert* hearing, based on the presentation as tendered today to the triers of fact." Vol. 41, p. 10083.

specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.*

Even if we considered Detective Holmes' testimony to be that of an expert witness, we find no abuse of the trial court's discretion in its determination that a *Daubert* hearing was not necessary for this type of evidence. Rather, the testimony regarding Detective Holmes' training, certification and experience, as well as the testimony of the dog's pedigree, training and experience, was sufficient to establish a foundation for the jury's consideration of the detective's subsequent testimony of the man-trailing dog's actions during the investigation. Although pre-*Daubert*, several rulings of this court have considered man-trailing dog evidence admissible to prove the identity of an accused in a criminal prosecution, as a circumstance tending to prove his guilt, if a proper foundation is laid for the admission of such evidence. *See State v. King*, 144 La. 430, 432-436, 80 So. 615, 615-616 (1919); *State v. Harrison*, 149 La. 83, 85, 88 So. 696, 697 (1921); *State v. Davis*, 154 La. 295, 310-312, 97 So. 449, 454-455 (1923); *State v. Green*, 210 La. 157, 163, 26 So.2d 487 (1946).

Pre-pubescent Fingerprint Evidence

The record shows that Stephen Meagher, the Unit Chief of the Latent Print Unit in the FBI laboratory in Quantico, Virginia, testified at the pretrial hearing.[318] Mr. Meagher was accepted by the court as an expert in fingerprint analysis, without defense objection. The defense specified there was no objection to the general field of fingerprint examination, and the trial court held the science of fingerprint examination was valid under *Daubert*.[319] Mr. Meagher testified regarding research which shows that the latent fingerprints of children who have not yet reached puberty

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[318] *See generally* Vol. 16, p. 3840-3896.

[319] Vol. 16, p. 3865.

are harder to develop and are less useful for examination purposes than those of a post-adolescent child or adults, due to a variety of factors. With regard to the admission of this testimony at trial, the trial court ruled:

> All right. Coming into today's proceedings, the Court has reviewed the pleadings and was not really aware as to what degree the controversy with regard to the pre-pubescent fingerprints would engage. After hearing the testimony and listening to Mr. Meagher, I don't think this is as near as complicated as the Court anticipated or possibly that it should be. We know that the fingerprint analysis, as indicated by all parties, is, in fact, a scientific examination that is accepted. We also know that Mr. Meagher is, in fact, an expert within the field of fingerprint examination. It was the Court's interpretation that the basis of his testimony was such that his expertise, which is in latent prints, noting 32 years of experience as well as the number of academic as well as I guess work-related experience that he has, shows that there is a difference between adult and children's prints and that the differences -- or that the length of the prints remaining is fact sensitive as to the results. It has nothing to do with the methodology -- it has nothing to do with the processing techniques, those being treated identical between the application, but does note that the results are distinguishable clearly for some reason or another. That the current concept, rationale, or scientific theory, so to speak, as to why the prints of children would or would not be present under the existing abilities and procedures that are available to these experts has been enunciated and given a substantial foundation as well as the background within the expertise of both the scientific field as well as the expertise of Mr. Meagher. As indicated, this does appear that it's going to be more of a fact sensitive argument and, in fact, is, in fact, a determination that a finder of fact would make as to whether that theory does apply to this situation or does not, but does not meet the specific areas of being a sub-science as anticipated by the Court and also partly argued by the Defense. The Court would see no reason to exclude the evidence, finding under [Art.] 702 that the concepts having a substantial background of our Code of Evidence 702 would or could assist the trier of fact in making -- in a determination of a fact at issue. And also finds that under -- I think it's Article 402 of the Code of Evidence, the probative value and in balancing that against the prejudicial effects would be such that the evidence would be reliable and helpful to the triers of fact in making that ascertainment of an issue that is relevant to this upcoming proceeding. For those reasons, the Court would allow the testimony and also understands that the Defense would have the same ability to put on counter-evidence as to credibility issues which would be for the finder of fact as well as any other additional scientific matters they feel would be contrary to that heard today.[320]

At trial, the state elicited testimony from Kenneth Dunn, an FBI fingerprint

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[320] Vol. 16, p. 3902-3904.

specialist, who was accepted by the court as an expert in fingerprint examination, development, analysis and comparison.[321] Agent Dunn testified that, after eight hours, development of a child's latent fingerprint is extremely difficult. Agent Dunn attributed this difficulty to the fact that the free fatty acids that primarily compose the excretions from a person's sebaceous glands are not as active in prepubescent children compared with post-pubescent children and adults.[322] Agent Dunn testified that a latent print of a prepubescent child, left on a surface that was affected by the environment, would dissipate at a much more rapid rate than that of an adult.[323] From this evidence, the state attempted to explain the failure to find the victim's fingerprints in the defendant's vehicle.

Our review of the record shows there was no abuse of the trial court's discretion in finding admissible this testimony regarding the characteristics of prepubescent fingerprints. The defense did not object either to the generally acknowledged reliability of fingerprint identification or to the expertise of the FBI agents who testified both pre-trial and during trial. Consequently, the trial court correctly found that there was no objection to the methodology of fingerprint evidence, only to conclusions reached in the circumstance of latent fingerprints of children. We find this information assisted the trier of fact to understand, on a scientific basis, the lack of evidence presented on an issue in this case.

Trace Evidence

The defense contends that the lack of error rate, or testability of the science of trace evidence, as maintained by the state's expert witness, should have rendered the evidence inadmissible at trial.

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[321] Vol. 40, p. 9852-9870.

[322] Vol 40, p. 9862-9864, 9872.

[323] Vol. 40, p. 9872.

The record shows that the state's expert witness, Cary T. Oien, was employed at the FBI laboratory located in Quantico, Virginia, as a forensic examiner in the Trace Evidence Unit.[324] At the pretrial hearing, he testified about his extensive training and education, and was accepted by the trial court as an expert in trace evidence, with an emphasis on hair and fiber.[325]

After listening to Mr. Oien's testimony regarding the collection, methodology and analysis of trace evidence, the trial court, after referencing the *Daubert* and *Kumho* cases, ruled:

> The test for admissibility of scientific evidence, [sic; in] Louisiana, it was from the *Cheairs* case,[326] lays a three-tiered evaluation. Initially is the expert qualified to testify competently regarding the matters he intends to address. The Court has noted that he has been accepted as an expert within the trace evidence field, specifically with an emphasis on hair and fiber. Secondary was the methodology by which he reaches his conclusions sufficiently reliable considering a series of tests which were gone over in detail by the State as well as in cross-examination, the Court finding that each of those questions being answered to its satisfaction in finding that the methodology is such as to substantiate its reliability, noting further that the specifics in this case are not a new technique and the methodology is clearly accepted in the industry. The last tier, upon accepting the testimony - - I mean, the methodology is whether the testimony would assist the trier of fact. As previously commencing the evaluation under Article 702, the Court notes further that the report speaks for itself that the testimony is such that it will or could understand or determine a fact that could be at issue at the trial of this matter; therefore the Court is afforded broad discretion in determining whether the expert testimony would be held admissible. At this time the Court would rule that the testimony concerning the trace evidence as received herein will be allowed. Mr. Oien will be allowed to be continued on as an expert in the field which he's been accepted in order to perpetuate that testimony to the triers of fact in this, ultimately the jury.[327]

At trial, Mr. Oien testified that purple acrylic fibers with the same microscopic

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[324] Vol. 17, p. 4023. At trial, the spelling of Mr. Oien's first name is designated as "Kerry." *See* Vol. 40, p. 9954.

[325] Vol. 17, p. 4032.

[326] The trial court was referencing the case of *Cheairs v. State, through the DOTD*, 2003-0680 (La. 12/3/03), 861 So.2d 536.

[327] Vol. 17, p. 4069-4070.

characteristics as those from the shirt and pants worn by the victim were found on the floorboard and passenger seat of the defendant's vehicle. In addition, a dog hair was found on the victim's pants, and dog hair and undifferentiated animal fur were found in the defendant's vehicle.[328]

With regard to the defendant's challenge regarding the rate of error, we find after our review of the record that the defense mischaracterizes the record. On direct examination, when Mr. Oien was asked about the rate of error, he stated: "[i]f I'm using that proper equipment [about which he had just testified] and the proper protocols, we're doing everything we possibly can to reduce that rate of error down to zero."[329] Due to the types of examinations and comparisons of each other's work, Mr. Oien agreed that the procedure used by the FBI is "generally accepted as having a very low rate of error."[330]

On cross-examination, the following testimony was adduced when defense counsel pressed for the rate of error in the analysis of trace evidence:

> Mr. Oien: First of all, there can never be an error rate - - when we're talking about case work, there can't be an error rate, because we never - - specifically with fiber examinations, fiber examinations are not an identifying technique. I can't say this fiber came from that shirt, because obviously there are other shirts that are made that are like that, so it's - - it's not an individualizing technique. But, the techniques that I use will - - answer the question whether or not that fiber is consistent with coming from that shirt, using the proper techniques, the proper protocol, which is - - I won't say universal because some people don't have the same equipment that we have at our disposal, but using those proper techniques, we're doing everything we can to say - - bring the error rate down to zero. Could there be another shirt that could have contributed those fibers? Yes, but that's really not the question. The question is, am I doing everything I can to determine whether or not these fibers

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[328] Vol. 40, p. 9972.

[329] Vol. 17, p. 4042.

[330] *Id.*

are consistent with that, yes, and therefore we're bringing the error rate as close to zero as possible. But as far as case working samples, there's no way to determine an error rate of an examiner.

Defense: So you're talking about an association, one from a known source and one from another source?

Mr. Oien: Correct.

Defense: I'm a lay person, obviously, in terms of this field of endeavor, and, sir, if you can answer it, fine, if you've already answered, tell me, but I'm - - what is the margin of error - - and did - - was that your answer just now, that there - - Is there such a thing?

Mr. Oien: There is not. It cannot be calculated.

Defense: So if you - - in this instance here, can - - and I hear that you're using the word that the two fibers from different sources - - excuse me - - strike that. I think you're basically saying it comes from the same source, but you're using the word "consistent", the fibers are "consistent" with coming from the same source.

Mr. Oien: Correct.

Defense: In my mind that's not an absolute.

Mr. Oien: That's correct, it's not an absolute.[331]

As stated in *Kumho*, not all of the factors of *Daubert* must be answered in every type of case. "Whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Kumho*, 526 U.S. 137, 153, 119 S.Ct. at 1176. Mr. Oien candidly stated that the analysis of trace evidence was to determine whether hair or fiber is consistent with another source, and is not an identification or absolute technique. Thus, his testimony regarding the rate of error within this field was entirely acceptable. The trial court did not abuse its discretion in finding admissible the expert testimony of this state witness.

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[331] Vol. 17, p. 4043-4033.

Assignment of Error 17
Other Crimes Evidence--Res Gestae

The defendant complains that the trial court improperly ruled that evidence concerning his stop at the Moss Bluff school was admissible as *res gestae* evidence.[332]

The record shows that the defendant filed a motion *in limine* to exclude this evidence.[333] The bases for exclusion argued in the defense motion were lack of relevance, potential prejudice and that the evidence did not constitute *res gestae*. The trial court denied the motion, finding that "this activity is what caused Mr. Reeves to be a suspect."[334] Further, the trial court stated:

> And so that part of that investigation whether it happened on that same day or a different day, as far as I'm concerned would come out because it is what caused him to be a suspect in the case.
>
> And I believe it is res gestae. Furthermore, I believe if we went through a full blown other crimes hearing, other bad acts hearing, it would come in even under that heightened scrutiny.
>
> So the motion is denied.[335]

La. C.E. art. 404(B) allows for the introduction of evidence of other crimes, wrongs or acts, as follows:

> **Art. 404. Character evidence generally not admissible in civil or criminal trial to prove conduct; exceptions; other criminal acts**
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> ***
>
> B. Other crimes, wrongs, or acts. (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

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[332] The school involved in this matter is St. Theodore's Holy Family Catholic School. The defendant incorrectly identifies the school as "St. Theresa's" throughout his argument. Appellant brief, p. 39-40.

[333] Vol. 5, p. 1181-1186.

[334] 1st Supp. Vol. 2, p. 279.

[335] *Id.*

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, **or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.** (Emphasis added)

This court discussed the admission of "integral act" evidence, also known as *res gestae*, in *State v. Colomb*, 1998-2813 p. 3-4 (La. 10/1/99), 747 So.2d 1074, 1075-1076:

> This Court has long approved of the introduction of other crimes evidence, both under the provisions of former R.S. 15:448 relating to *res gestae* evidence and as a matter of integral act evidence under La.C.E. art. 404(B), "when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it." *State v. Brewington*, 601 So.2d 656, 657 (La.1992). This doctrine encompasses "not only spontaneous utterances and declarations made before and after commission of the crime but also testimony of witnesses and police officers pertaining to what they heard or observed before, during, or after the commission of the crime if the continuous chain of events is evident under the circumstances." *State v. Molinario*, 383 So.2d 345, 350 (La.1980). We have required a close connexity between the charged and uncharged conduct to insure that "the purpose served by admission of other crimes evidence is not to depict the defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Haarala*, 398 So.2d 1093, 1098 (La.1981) (emphasis added); see also 1 McCormick on Evidence, § 190, p. 799 (4th ed., John William Strong, ed., 1992) (other crimes evidence may be admissible "[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings.") (footnote omitted). The *res gestae* or integral act doctrine thus "reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness." *Old Chief v. United States*, 519 U.S. 172, 186, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997). The test of integral act evidence is therefore not simply whether the state might somehow structure its case to avoid any mention of the uncharged act or conduct but whether doing so would deprive its case of narrative momentum and cohesiveness, "with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." *Id.*

At trial, several witnesses testified about the Moss Bluff school incident. The testimony of these witnesses was necessary for the state to accurately depict its case

to the jury. Erin Schrepfer, an after-care provider, testified about the defendant's odd behavior at the school only a short time before M.J.T. was reported missing from the nearby trailer park.[336] Michelle Rogers, the head of the extended daycare program, who watched over the children until their parents picked them up, observed the defendant and his vehicle at the school. She wrote down the defendant's license plate number and requested that the school's principal report the vehicle's description and license plate number to the CPSO. She later identified the defendant in a photographic line-up, and again in-court, as the person she had seen behaving suspiciously.[337] Deputy Allen Cormier of the CPSO was dispatched to the school to investigate the incident after the sheriff's office was notified; he later was the first responder to the trailer park after receiving the dispatch involving the missing child, M.J.T.[338] Janice Duraso of the CPSO received the call from the school at the sheriff's office substation and reported the call to Deputy Cormier. She later informed her fellow law enforcement officers that the suspicious vehicle at the school was registered to Jason Reeves.[339]

We find this testimony was important to the narrative completion of the state's case and was vital to its explanation of how the defendant so quickly became a suspect. There was no error in the trial court's ruling denying the defendant's motion *in limine* as to this testimony and in admitting this testimony in evidence at trial.

Assignments of Error 63-70
Arbitrary and Unreliable Factors in Penalty Phase

The defendant contends that the state secured a death sentence by introducing

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[336] Vol. 38, p. 9311-9317. The incident occurred at the school after school let out that day, approximately 3:15-3:30 p.m. The sheriff's office was notified and responded. The 911 call for the missing child was made at 5:02 p.m. Vol. 37, p. 9210.

[337] Vol. 38, p. 9318-9326.

[338] Vol. 38, p. 9281-9287.

[339] Vol. 38, p. 9327-9330.

arbitrary and unreliable factors into the penalty phase. The complained-of factors include: (1) evidence of the defendant's future dangerousness; (2) evidence of unadjudicated conduct that was not a crime of violence; (3) a request for this court to revisit previous rulings regarding the scope of evidence presented; (4) prior conditions of the defendant's parole and probation; (5) irrelevant evidence regarding the conditions at the state prison; (6) prejudicial evidence concerning the death of the victim's father and (7) the shackling of the defendant's brother during his testimony.

This court has recognized that "[a]rbitrary factors are those which are entirely irrelevant or so marginally relevant to the jury's function in the determination of sentence that the jury should not be exposed to these factors; otherwise, the death penalty may be imposed 'wantonly or freakishly' or for discriminatory reasons." *State v. Thibodeaux*, 1998-1673 p. 14 (La. 9/8/99), 750 So.2d 916, 928, *cert. denied*, 529 U.S. 1112, 120 S.Ct. 1969, 146 L.Ed.2d 800 (2000), *citing Comeaux, supra and Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). With this definition in mind, we will address each of the factors objected-to by the defense.

1. Evidence of future dangerousness

The defendant complains that the state introduced evidence regarding statements he made to detectives during his incarceration. He argues that these statements were introduced to show that he would be a danger if imprisoned.

The record shows that the state gave the defense notice of its intent to use the defendant's statements during the penalty phase of trial as evidence of the defendant's character and propensities. The defense objected to the admissibility of these statements and a hearing was held. The trial judge denied the defense objection and ruled that these statements were admissible in the penalty phase of the defendant's capital trial. Prior to the introduction of these statements at trial, the defense again

objected.[340]

After listening to the defense's arguments, the trial court noted:

> Well, I mean, you've indicated that it introduces an arbitrary fact. The thing is, is anything in the sentencing hearing that is considered relevant may be proposed under the rules of evidence, if it's not under 403, more prejudicial than it would be probative. One of the legitimate purposes is showing that the defendant represents a future danger to society, that could be free society as well as incarcerated society. I think that the extrapolation is well-founded and within the boundaries. The Court cites *Dawson v. Delaware*, U.S. Supreme Court, 112 S.Ct. 1093, stands for that premise of future dangerousness, to bring out information or statements or even memberships, in order to establish that information.[341]

The court and defense thereafter held a discussion as to whether future dangerousness, which is allowed as a factor in some states' death penalty considerations, should be considered here. The trial judge found that future dangerousness was yet another factor in determining the character and propensities of the defendant, the focus of a penalty phase hearing:

> I know that [the *Dawson* case] is contained in our bench book as a standard for future dangerousness is permissible, relevant information, and they use that as the basis or the test to establish that. Again, it goes to the general area of character and propensities of the defendant, which is the thrust of the penalty phase.[342]

After entertaining further argument, the trial court ruled:

> ...the objection is noted to the Court's ruling by Mr. Ware for the reasons that he has stated, and the Court finds that the probative value specifically in a penalty phase as to the defendant's position with regard to life imprisonment versus the death penalty for either personal or against others is clearly relevant, and that that relevance far exceeds any prejudicial value that would be incurred in the statements.[343]

Thereafter, Detective Zaunbrecher testified that on December 10, 2001, after

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[340] Vol. 43, p. 10554-10574.

[341] Vol. 43, p. 10560-10561.

[342] Vol. 43, p. 10562.

[343] Vol. 43, p. 10573.

the defendant completed a rights waiver form, he told her he was not going to serve life in prison.[344] He told the detective "he would make them wish that they had given him the death penalty if he didn't get it, because there was no way he was serving life in prison."[345] She testified about Reeves' demeanor as he made the statement, how he was slumped down, acting arrogant and defiant. The detective contrasted the defendant's demeanor on this occasion with his actions captured on videotape after his arrest. Unlike the other occasion, at this time the defendant would not stop talking.[346] He told the detective "at this point he didn't have anything to lose."[347] She described how the defendant made a slashing gesture across his neck and stated "what are they gonna do, give me the - - give me life in prison twice?"[348] When Detective Zaunbrecher asked why he made that statement, Reeves responded, "he was going to let them know that this boy, is how he put it, has to go, there was no way he was serving life in prison."[349]

Although the defense asked no questions of Detective Zaunbrecher on cross-examination, the defense again objected, both to her testimony and the up-coming testimony of Detective Primeaux. The trial court denied the renewed objection[350] Detective Primeaux testified similarly to Detective Zaunbrecher regarding the

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[344] Detectives Zaunbrecher and Primeaux were investigating an aggravated rape of a family member, for which the defendant was a suspect, on December 10, 2001. Prior to calling these witnesses to the stand, the prosecutors cautioned defense counsel not to inquire why the officers were speaking with the defendant, since they were conducting an interview for an unrelated crime. The prosecution made clear its intent to adduce only those statements which were relevant to the defendant's character and propensities, and not with regard to this unrelated crime. Vol. 43, p. 10549-10552.

[345] Vol. 43, p. 10579.

[346] Vol. 43, p. 10579-10580.

[347] Vol. 43, p. 10580.

[348] *Id.*

[349] *Id.*

[350] Vol. 43, p. 10581-10585.

incident.[351] Detective Primeaux was not cross examined by the defense.

The state then called Deputy Mandy Taggert of the CPSO. Deputy Taggert testified that, after transporting the defendant from a court appearance back to the jail on November 5, 2003, the defendant, who had otherwise been silent on the trip, announced to her as he was exiting the van, "If I get out of jail, I will find another child and kill again."[352] Deputy Taggert testified the defendant "then smiled and he started laughing."[353]

La. C.Cr.P. art. 905.2(A) provides in pertinent part that "the sentencing hearing shall focus on ... **the character and propensities of the offender,** ... ." (Emphasis added). We find no abuse of discretion or error in the trial court's ruling which found these statements of the defendant to be admissible. This testimony was highly probative evidence of the defendant's character and propensities, and the testimony was properly admitted at the penalty phase of his trial. Further, the defendant made this issue relevant through his introduction of the testimony of prison life expert Burk Foster.

Insofar as the defense complains about the prosecutor's use of this evidence in closing argument, we note that the testimony provided a factual basis for the prosecutor's argument. *See State v. Brumfield*, 1996-2667 p. 8 (La. 10/20/98), 737 So.2d 660, 665, *cert. denied*, 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999) ("the prosecutor had a factual basis for the remarks [of future dangerousness] in this case, and this portion of the closing argument did not inject an arbitrary factor into the proceedings.").

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[351] Vol. 43, p. 10585-10590.

[352] Vol. 43, p. 10592.

[353] *Id.*

2. Unadjudicated conduct that was not a crime of violence

The defendant complains that the state introduced unadjudicated conduct in the penalty hearing that was not a crime of violence, in violation of *State v. Jackson*, 608 So.2d 949, 954 (La. 1992), thus, interjecting an arbitrary factor. Specifically, Reeves argues the testimony of Whitney Higgins did not refer to a crime of violence under La. R.S. 14:2(B).

The state's witness, Whitney Higgins, testified that on November 8, 2001, just days before the instant crime, the defendant grabbed her buttocks as she walked down the hallway of her school near the end of the school day. At that time, she was 13 years old and in the eighth grade.[354] The record shows there was no defense objection to this testimony.[355] Counsel's failure to contemporaneously object waives review of these issues on appeal. La. C.Cr.P. art. 841; *State v. Wessinger*, 1998-1234 p. 20 (La. 5/28/99), 736 So.2d 162, 179-181, *cert. denied*, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999).

3. Request to revisit prior court rulings

While acknowledging the admissibility of evidence of the defendant's two adjudications for simple burglary when Reeves was 16 years old, the defendant urges the court to revisit its rules regarding the admission of juvenile adjudications in the penalty phase of capital proceedings in *State v. Jackson*, 608 So.2d 949, 954 (La. 1992). Without more, the court finds no compelling reason to review our prior jurisprudence on this issue.

4. Introduction of prior conditions of the defendant's parole and probation

The defendant complains that evidence of his prior conditions of parole and

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[354] Vol. 43, p. 10545-10547.

[355] *Id.*

probation were admitted in evidence as grounds to secure a death sentence. Reeves claims this testimony introduced an arbitrary factor into the jury's sentencing determination, as well as irrelevant evidence concerning treatment programs which he failed to attend. The record shows there were very brief references to Reeves' probation and parole admitted at the penalty phase of his trial. Counsel's failure to contemporaneously object waives review of these issues on appeal. La. C.Cr.P. art. 841; *Wessinger*, 1998-1234 p. 20, 736 So.2d at 179-181. Moreover, the testimony directly contradicted the defense's contention at penalty phase that Reeves was never offered counseling or help.

5. Conditions at state prison

The defense contends the prosecutor engaged in an improper, extended examination of the benefits of prison life. The record shows that this testimony was elicited by the prosecutor on cross-examination of the defendant's witness, Burk Foster. No defense objection was raised to this testimony. Counsel's failure to contemporaneously object waives review of these issues on appeal. La. C.Cr.P. art. 841; *Wessinger*, 1998-1234 p. 20, 736 So.2d at 179-181.

6. Testimony concerning the death of the victim's father

The defendant argues that argument and evidence concerning the death of M.J.T.'s father introduced arbitrary factors into the culpability and penalty phases of his trial.

The record shows that the references made to M.J.T.'s father, and the fact that he would not be appearing at the trial, were few. In opening statement in the guilt phase of trial, the prosecutor made the statement that the jury would not be hearing from M.J.T.'s father, J.T., because he had been killed a few months previous to trial

by a drunk driver.[356] The defense objected to the state's informing the jury of the cause of the death of the victim's father, even asking for a mistrial, arguing that the jury would be swayed by sympathy for this additional tragedy in the victim's family.[357] The trial court overruled the defense's objection, finding the issue to be factual, with the exception of information of how J.T. died. After receiving instruction from the court that he should refer to the cause of J.T.'s death as a traffic accident only, and the court's commitment that the jury charge would instruct the jury to avoid the influence of bias or sympathy, the prosecutor continued with his opening statement.[358]

Limited information regarding J.T. was adduced in the guilt phase. During the testimony of C.T., the victim's mother, the jury was informed that J.T. had died two months before trial.[359] C.T. also testified about the actions of J.T. on the day of M.J.T.'s disappearance.[360]

In the penalty phase, M.J.T.'s grandfather, J.T.'s father, provided victim impact testimony.[361] Within his very brief prepared statement, he referenced the fact that his son would have wanted to have been at the trial, and expressed the hope that M.J.T. and her father were now reunited.[362] When C.T. testified, she also very briefly expressed her belief that her husband would have wanted to have been at the trial to have told the jury about M.J.T.[363]

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[356] Vol. 37, p. 9190.

[357] Vol. 37, p. 9190-9199.

[358] *Id.*

[359] Vol. 37, p. 9247-9248.

[360] Vol. 38, p. 9251-9252.

[361] Vol 43, p. 10596.

[362] Vol. 43, p. 10596-10597.

[363] Vol. 43, p. 10602-10603.

Aside from the prosecutor's comment in opening statement in the guilt phase, the defense failed to object to any other references to J.T. which are found in the record. Review of this testimony is therefore waived on appeal. La. C.Cr.P. art. 841; *Wessinger*, 1998-1234 p. 20, 736 So.2d at 179-181. However, we note that the testimony adduced in the guilt phase was necessary to C.T.'s narration of events on the day of M.J.T.'s disappearance. Further, the references to M.J.T.'s father in the penalty phase were brief, natural, and not unexpected.

With regard to the objected-to statement in the prosecutor's opening statement in guilt phase, we agree with the trial court that the statement was informational as to why J.T. would not be testifying. As such, the statement failed to inject an arbitrary factor into the proceeding. The trial court did not abuse its discretion in denying the defendant's motion for mistrial. The court's charge to the jury after the guilt phase of trial instructed that they were not to be influenced "by sympathy, passion, prejudice, bias, or public opinion."[364]

Finally, we hold that these brief references to the death of M.J.T.'s father never shifted the focus of these proceedings from the culpability of the defendant for the rape and murder of M.J.T. and the appropriate punishment for those actions. No arbitrary factor was injected into the jury's determinations on these issues.

7. Witness shackling

The defendant argues that an arbitrary factor was injected into the sentencing decision when the court refused to allow his brother to testify in street clothes and without shackles.

The record shows that, prior to the presentation of the defendant's evidence at penalty phase, and outside of the jury's presence, defense counsel requested that the

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[364] Vol. 42, p. 10445.

court allow the defendant's brother, Ronald Reeves, to wear civilian clothing with regard to his testimony.[365] The trial court stated the court would consider the request as a motion.[366]

After hearing the arguments of counsel, the trial court denied the motion/request.[367] First, the trial court stated there were considerable security issues to consider. Ronald Reeves, the defendant's younger brother, had been convicted of second degree murder and was currently serving a life sentence at Angola, the state penitentiary. Jason Reeves, the defendant, had just been convicted of first degree murder and had a history of an attempt to escape from prison. Considering the seriousness of the convictions of the witness and the charge brought against the defendant, their relationship, and the prior history of escape for the defendant, the trial court denied the request for civilian clothing.

Defense counsel then asked if Ronald Reeves could be unshackled during his testimony. Citing the same security concerns for which he denied the request for street clothes, the trial court denied the request that Ronald Reeves be unshackled. However, upon the defense's request, and without objection by the state, the trial court agreed to remove the box attached to the wrist handcuffs which restricted Ronald Reeves' movement. In addition, and in order to de-emphasize the fact that the witness would be shackled, the trial court ordered that Ronald Reeves would be brought in from the back and would travel no further than the witness stand. After the jury exited, the trial court would have Ronald Reeves removed the same way he had come in.[368]

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[365] Vol. 43, p. 10610.

[366] *Id.*

[367] *See generally* Vol. 43, p. 10610-10615.

[368] Vol. 43, p. 10614.

On direct examination, the defense elicited from Ronald Reeves that he was currently serving a life sentence for a second degree murder conviction.[369] On cross-examination, without objection, the prosecution elicited the information that Ronald Reeves killed his victim in the LeBleu Cemetery, just as his brother did.[370]

Our review of the record shows that no arbitrary factor was injected into the jury's sentencing determination by the fact that this defense witness testified in prison clothes and shackles. First, the safety concerns cited by the trial judge were valid. Additionally, the trial court tried to minimize the prejudice to the defendant by the manner in which the witness was brought in and removed from the courtroom. Moreover, the state had the right to impeach the testimony of this witness with his conviction and sentence; thus, the jury would not have remained ignorant of his present incarceration. Under these circumstances, we find no error in the trial court's ruling on the defense's request. We do not find that an arbitrary factor was injected into the jury's determination of penalty.

Assignment of Error 71
Gruesome Photos and Videotape

The defendant argues the trial court erred in failing to exclude the video re-enactment of the discovery of the victim's body and the autopsy photographs. Reeves contends that the videotape was gruesome and morbid, and offered little evidence of probative value. Reeves asserts post-mortem changes to the bodies of victims greatly decrease the relevance of autopsy photographs. The record shows defense counsel objected to the videotape and the projection of the autopsy photographs.[371]

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[369] Vol. 43, p. 10648-10649.

[370] Vol. 43, p. 10659.

[371] Vol. 12, p. 2766-2767 (written motion to exclude videotape); Vol. 39, p. 9627-9628 (trial objection to videotape); Vol. 41, p. 10190-10195, 10206-10213 (objection to projection of autopsy photographs).

The law with regard to the admissibility of allegedly gruesome photographs is clear:

> The state is entitled to the moral force of its evidence, and post-mortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, as well as location and placement of wounds and to provide positive identification of the victim. *State v. Koon*, 1996-1208, p. 34 (La.5/20/97), 704 So.2d 756, 776 (*orig.hrg*); *State v. Maxie*, 1993-2158 (La.4/10/95), 653 So.2d 526, 532, n. 8, *citing State v. Martin*, 1993-0285, p. 14 (La.10/17/94), 645 So.2d 190, 198; *State v. Watson*, 449 So.2d 1321, 1326 (La.1984); *State v. Kirkpatrick*, 443 So.2d 546, 554-555 (La.1983). Photographic evidence will be admitted unless it is so gruesome that it overwhelms jurors' reason and leads them to convict without sufficient other evidence. *Koon*, 1996-1208 p. 34, 704 So.2d at 776, (*citing State v. Perry*, 502 So.2d 543, 558-559 (La.1986), *cert. denied*, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987)).

Contrary to the defense's contention, the videotape in question is not a "re-enactment" of the discovery of the victim. As soon as the victim was discovered, and before anyone had disturbed the scene of the crime, a videotape of the area was made. Our review of the videotape shows that the video is very brief, lasting approximately two minutes. The video shows the area in which the victim's body was found, as well as the victim's body, both from a distance and at close range. As such, the video shows the victim's body in relation to the path around the cemetery and the nearby woods. There is no audio. Although graphic, the videotape shows undeniably relevant evidence of the crime scene and the extent of the victim's injuries. Further, the videotape shows the positioning of the victim's body, which is consistent with that of a rape victim, which is therefore pertinent to an aggravating consideration in this case.

Also contrary to the defense's contention, the objection at trial to the autopsy photographs was to their projection, and hence, enlargement, and not to their content. In fact, when the trial court observed: "I got the impression it was not necessarily the photographs that are being presented but the fact they were going to be enlarged" due

to projection, defense counsel replied, "Yes, sir, that's exactly right. You stated my position correctly. It's not the photographs themselves."[372] Any objection to the content of the autopsy photographs is waived on review. . La. C.Cr.P. art. 841; *Wessinger*, 1998-1234 p. 20, 736 So.2d at 179-181.

With regard to whether there was error in the projection of the autopsy photographs, the record shows that Dr. Welke, the coroner, informed the trial court that each of the slides illustrated a distinct or unique point on which he would be commenting or for which he would be giving a description.[373] This statement was borne out by his testimony, during which the post-mortem photographs appear relevant to demonstrate cause of death, placement of wounds, commission of anal rape and to establish the defendant's specific intent to kill. In addition, the trial judge noted for the record that the twelve jurors and four alternates were seated, at least along the back row, nine seats across. The jurors were approximately 25-30 feet from the screen, which was 2 ½ feet x 3 feet.[374] Clearly, for logistical reasons, so that all of the jurors could see the evidence at the same time the coroner was giving his testimony, the necessity of projection of the autopsy photographs was shown. There was no error in the trial court's rulings with regard to the admissibility of either the crime scene videotape or the projection of the coroner's post-mortem photographs.

Assignments of Error 72-77
Jury Instructions

The defendant complains the trial court erred in its instructions to the jury, claiming that a reasonable juror would not have comprehended the trial court's instructions in a constitutionally permissible manner. Specifically, the defendant

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[372] Vol. 41, p. 10206.

[373] Vol. 41, p. 10210.

[374] Vol. 41, p. 10210.

contends the trial court: (1) impermissibly shifted the burden of proof to the defendant; (2) improperly instructed regarding reasonable doubt; (3) failed to instruct jurors to individually and seriously consider mitigation evidence; (4) failed to instruct that the jury needed to find that death was the appropriate punishment beyond a reasonable doubt; (5) erroneously instructed on the governor's power to commute.

1. Impermissible *Sandstrom* instruction

The defendant complains that the trial court's instruction that "[y]ou may infer that the defendant intended the natural and probable consequences of his act" is prohibited by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[375] The record shows that the defense objected to this charge, preserving the issue for review.[376]

As this court noted in *Robertson*, 1997-0177 p. 12, 712 So.2d at 21, the *Sandstrom* Court focused particularly on the word "presumes," which gives the jury the impression the presumption is mandatory rather than a permissible inference, improperly shifting the burden of proof from the state to the defendant on the issue of intent. Here, the trial court did not use the word "presume," instead using the more appropriate word "infer." *See also Mitchell*, 1994-2078 p. 5, 674 So.2d at 255 (instruction of inference not improper). Accordingly, the instruction given in this case, like the language deemed acceptable in *Robertson* and *Mitchell*, does not set forth a conclusive or rebuttable presumption shifting the burden of proof from the state to the defendant. *See Francis v. Franklin*, 471 U.S. 307, 314-18, 105 S.Ct. 1965, 1970-73, 85 L.Ed.2d 344 (1985) (instruction allowing jury permissive inference of intent from circumstances violates due process only if unreasonable in light of

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[375] Vol. 42, p. 10439.

[376] Vol. 42, p. 20448. Defense counsel incorrectly referred to the authority for its objection as *Oregon v. Sandstrom*.

facts); *State v. Mattheson*, 407 So.2d 1150, 1161-62 (La.1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983) (court approves instruction setting out "a permissive inference that intent ... may be [inferred] under certain circumstances."). Accordingly, defendant's claim concerning a purported *Sandstrom* violation lacks merit.

2. Improper articulation requirement for reasonable doubt

The defendant contends the trial court's reasonable doubt instruction contained an unconstitutional articulation requirement. The record shows that, other than the *Sandstrom* objection raised to the guilt phase jury instructions, defense counsel raised no further objection.[377] Consequently, counsel's failure to contemporaneously object waives review of this issue on appeal. La. C.Cr.P. art. 841; *Wessinger*, 1998-1234 p. 20, 736 So.2d at 179-181.

3. Improper mitigation instruction

The defendant complains that the trial judge failed to instruct the jury that a single vote for life would result in a sentence of life imprisonment.[378] However, the record shows the defendant's contention is factually inaccurate. After instructing the jury on the law regarding its consideration of aggravating and mitigating circumstances, the trial court informed the jury: "If the jury is unable to reach a unanimous verdict for either death or life imprisonment, then the Court will be

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[377] Vol. 42, p. 10449.

[378] The state correctly points out that the defendant proposed several jury instructions regarding the consideration of mitigating circumstances, none of which raised the precise point argued on appeal. In fact, the record shows that Proposed Penalty Phase Jury Instruction #3 included the statement that "each individual juror must consider mitigation." Although defense counsel conceded the charge given included the instruction "you must decide this for yourself," counsel still objected to the absence of the word "individual" in the instruction. Vol. 44, p. 10868, 10870-10871. The trial court denied this proposed jury charge, finding the "entirety of the instruction clearly contains the parameters of the proposed jury instruction and the Court found it repetitious and not within the standardized jury charges given by this Court." Vol. 44, p. 10871. Nevertheless, the issue raised on appeal is the absence of an instruction that "a single vote for life would result in a sentence of life imprisonment." Appellant's brief, p. 83. Rather than find the issue was not preserved for appeal, we instead point out the issue actually raised is factually inaccurate.

required to impose a life sentence without benefit of probation, parole, or suspension of sentence."[379]

4. Burden of proof for sentence

The defendant complains that the trial court failed to instruct the jury as to the standard for determining the appropriate punishment, contending the trial court should have informed the jury that death was appropriate only if found by the jury beyond a reasonable doubt. The defendant asserts such "standardless jury discretion" is unconstitutional, relying on the Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

This court has already considered, and rejected, this precise argument in *State v. Anderson*, 2006-2987 p. 61 (La. 9/9/08), 996 So.2d 973, 1015, *cert. denied*, __U.S.__, 2009 WL 210493 (2009):

> However, *Ring* requires that jurors find beyond a reasonable doubt all of the predicate facts which render a defendant eligible for the death sentence, after consideration of the mitigating evidence. *Id.*, 536 U.S. at 609, 122 S.Ct. at 2443. While defendant now argues that *Ring* should extend such a requirement to the ultimate sentence as well as the predicate facts, neither *Ring*, nor Louisiana jurisprudence for that matter, requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt. *State v. Koon*, 96-1208, p. 27 (La.5/20/97), 704 So.2d 756, 772-73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard.") (citation omitted).

5. Governor's commutation power

The defendant complains that the trial court erroneously instructed the jury at the penalty phase about the governor's power to grant a reprieve, pardon or commutation of sentence following the conviction of a crime. The defendant argues that, since the governor is not independently authorized to commute a death sentence to life without parole, but is only authorized to take such action on the

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[379] Vol. 44, p. 10863-10864.

recommendation of the Pardon and Parole Board, the jury was given an instruction which was not completely accurate.[380]

Initially, we note that the defendant failed to object to the commutation instruction at trial. However, the defendant raised the commutation instruction as an error in his motion for new trial.[381] At the hearing on the motion for new trial, the trial court denied the claim, finding that the proper instruction was given in conjunction with Louisiana law, specifically the provisions of La. C.Cr.P. art. 905.2, and federal law. The trial court preserved the defendant's objection to the ruling for the record.[382]

In the motion for new trial, the defendant specifically objects to this court's ruling in *State v. Loyd*, 1996-1805 (La. 2/13/97), 689 So.2d 1321, which upheld as constitutional the application of LSA-C.Cr.P. art. 905.2(B).[383] In *Loyd*, this court

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[380] We note that the defendant's cited constitutional authority for this assertion is incorrect. There is no La. Const. art. 5, § 5(E)(1). *See* Appellant's brief, p. 84. La. Const. art. 5, § 5 describes the powers of the judicial branch. The entirety of La. Const. art. 5, § 5(E) states:

> (E) Additional Jurisdiction until July 1, 1982. In addition to the provisions of Section 5(D) and notwithstanding the provisions of Section 5(D), or Sections 10(A)(3) and 10(C), the supreme court shall have exclusive appellate jurisdiction to decide criminal appeals where the defendant has been convicted of a felony or a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed, but only when an order of appeal has been entered prior to July 1, 1982 and shall have exclusive supervisory jurisdiction of all criminal writ applications filed prior to July 1, 1982 and of all criminal writ applications relating to convictions and sentences imposed prior to July 1, 1982.

[381] Vol. 13, p. 3092-3093.

[382] Vol. 44, p. 10942.

[383] La. C.Cr.P. art. 905.2 provides in pertinent part:

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> B. Notwithstanding any provision to the contrary, the court shall instruct the jury that under the provisions of the state constitution, the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, and the governor may, in exercising such authority, commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence including the possibility of parole, and may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole. The court shall also instruct the jury that under this authority the governor may allow the release of any offender either by reducing a life imprisonment or death sentence to the time already served by the

found that "Louisiana's [commutation] instruction is an even-handed one which accurately informs jurors that a death sentence as well as a life sentence remains subject to executive revision." *Loyd,* 689 So.2d at 1331. The defendant presents nothing which would cause us to re-examine our previous holding in *Loyd.* Moreover, no matter the procedural mechanism by which the issues of commutation, reprieve or pardon would be brought before the governor, under the provisions of La. Const. art. 1, § 16 and La. C.Cr.P. art. 905.2, the law confers only upon the governor the power to grant a commutation, reprieve or pardon.[384] Consequently, the jury was properly instructed on the law as to commutation.

Assignment of Error 78
Motion for New Trial/Motion to Recuse

The defendant complains that his new trial motion was improperly denied, that he lacked sufficient time to file it, and that his motion to recuse the trial judge from assessing a claim involving a court comment was also improperly denied.[385]

Instead of filing a motion to recuse the trial judge under the provisions of La.

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offender or by granting the offender a pardon. The defense may argue or present evidence to the jury on the frequency and extent of use by the governor of his authority.

[384] La. Const. art. 1, § 16 provides in pertinent part:

§ 16. Right to a Fair Trial

Section 16. . . . However, nothing in this Section or any other section of this constitution shall prohibit the legislature from enacting a law to require a trial court to instruct a jury in a criminal trial that the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, that the governor in exercising such authority may commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence which includes the possibility of parole, may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole, or may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon.

[385] The title of the defendant's motion is ""Motion For New Trial And For Arrest Of Judgment And To Delay Sentencing For Extension Of Time To File Amended And Supplemental Motion For New Trial And Amended Supplemental Motion For Arrest Of Judgment." Vol. 13, p. 3065. During the discussion of this assignment of error, the motion will be referred to only as a motion for new trial.

C.Cr.P. art. 671, the defendant raised a recusal claim within his new trial motion, seeking to recuse Judge Canaday from acting on the motion for new trial.[386] The bases for the recusal claim were: (1) a comment made by the trial court to the jurors, which the defendant claims showed the trial judge publicly expressed his support for the verdict; and (2) the defendant's assertion that the trial judge might be a witness for several of the issues raised in the motion for new trial due to the fact that he was present and conducted in-chambers and off-the-record hearings in connection with the case. The record shows the trial judge held a hearing on the motion for new trial on December 10, 2004, denying the recusal request and the motion on the merits.[387]

Motion to Recuse

Assuming the recusal claim was properly raised, the complained-of comment does not support a basis to recuse Judge Canaday from acting on the defendant's motion for new trial. The grounds for recusation of a judge are set forth in La. C.Cr.P. art. 671:

> **Art. 671. Grounds for recusation of judge**
>
> A. In a criminal case a judge of any court, trial or appellate, shall be recused when he:
>
> (1) Is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial;
>
> (2) Is the spouse of the accused, of the party injured, of an attorney employed in the cause, or of the district attorney; or is related to the accused or the party injured, or to the spouse of the accused or party injured, within the fourth degree; or is related to an attorney employed in the cause or to the district attorney, or to the spouse of either, within the second degree;
>
> (3) Has been employed or consulted as an attorney in the cause,

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[386] Vol. 13, p. 3068-3070. Claim I of the new trial motion was entitled, "Serious Claims About Potential Judicial Bias Require Investigation And May Warrant Recusal Of The District Court."

[387] Vol. 44, p. 10894, 10976.

or has been associated with an attorney during the latter's employment in the cause;

(4) Is a witness in the cause;

(5) Has performed a judicial act in the case in another court; or

(6) Would be unable, for any other reason, to conduct a fair and impartial trial.

B. In any cause in which the state, or a political subdivision thereof, or a religious body is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision, or pays taxes thereto, or is a member of the religious body is not of itself a ground for recusation.

The record shows that the comment about which the defendant complains was issued by the trial judge post-verdict, post-sentence and as the judge released the jury from service. The entirety of the trial judge's comments in dismissing the jurors were as follows:

> All right. Ladies and Gentlemen, at this time before I do dissolve the rule of sequestration and release you from your service, I do want you to know that I speak on behalf of everyone here in this courtroom, as well as in this community, and hopefully on behalf of the state, to thank you for what you've given as an important service, not only to this Court, to these attorneys, these litigants, this community, but to the American system of justice; for that you should be proud. You've performed one of the highest duties I think that an American citizen can do in the state of Louisiana and dealt with one of the most serious matters in this country that an individual can deal with. I'm proud because of the way that you've taken away from those - - your loved ones, your jobs, your time, your free time, and you've given this back to us. I want you to understand that my pride does not have anything to do that I either praise your decision or oppose your decision, that is strictly your province, you were the judges of the facts in this matter; but it's for the contribution you've given our system that I do want to thank you for. Also, I want you to know, and I think you should be very proud, that this is very important, that you've given some closure to the families in this community, as well as to the community of southwest Louisiana, on a cloud that's hung over us for some time, and for that I thank each and every one of you. All right. At this time let the sequestration order that was previously imposed on the jurors be lifted, you are released from your jury service at this time. I would ask that you please go back into the jury pool room, I do have some certificates, and at this point I have the opportunity that we can talk very candidly about the case, since the case has now been terminated, as far as your involvement, and the - - I

> will be back there shortly. I have some other housekeeping matters to take care of, but if we would stand and let the jury leave. Let the record reflect it is exactly 7:59 p.m., rule of sequestration is now dissolved, October the 8th - - November the 8th, 2004.[388]

There is no merit to the defendant's contention that the trial judge's comments expressed support for the verdict, when his comments specifically state that he neither "praise[d] your decision or oppose[d] your decision." Rather, we find the statements made by the judge were general comments thanking the jurors for their service in a difficult case.

Neither does the other ground raised in the recusal request support Judge Canaday's recusal. This court has previously held that a trial judge's participation as presiding judge in the trial of a defendant is not sufficient to warrant recusal. *State v. Williams*, 601 So.2d 1374, 1375 (La. 1992) ("Where the alleged bias or prejudice stems from testimony and evidence presented in the proceedings, the bias or prejudice is not of an extrajudicial nature as would warrant recusal."). Nor do we find error in the fact that Judge Canaday ruled on the recusal request himself. "Where the motion to recuse does not set forth affirmative allegations of fact stating valid grounds for recusation, the trial judge may overrule the motion without referring the matter to another judge." *Williams*, 601 So.2d at 1375; *see* La. C.Cr.P. art. 674.[389] Our review of the record supports the trial judge's denial of the recusation request. Contrary to the defendant's claim that the denial of the recusal request implicated his right to due

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[388] Vol. 44, p. 10880-10881.

[389] La. C.Cr.P. art. 674 provides:

Art. 674. Procedure for recusation of trial judge

> A party desiring to recuse a trial judge shall file a written motion therefor assigning the ground for recusation. The motion shall be filed prior to commencement of the trial unless the party discovers the facts constituting the ground for recusation thereafter, in which event it shall be filed immediately after the facts are discovered, but prior to verdict or judgment. If a valid ground for recusation is set forth in the motion, the judge shall either recuse himself, or refer the motion for hearing to another judge or to a judge ad hoc, as provided in Article 675.

process and a fair tribunal, we find there was no error or abuse of the trial judge's discretion in denying the request for recusation.

Motion for New Trial

Appellate defense counsel claims he was contacted two days before sentence was scheduled to be imposed in this case and was informed that trial counsel would not be filing a motion for new trial. Appellate defense counsel prepared and filed a 49-page motion for new trial, seeking a 90-day delay of sentencing in order for counsel to review transcripts; to meet with Mr. Reeves and all the members of his defense team, both for the initial trial and the re-trial; and to conduct investigation into the matters to be raised.[390] The trial court refused to grant a delay in sentencing; instead, the trial judge proceeded to rule on the issues raised in the motion for new trial:

> First of all, the Court notes that many of the, if not all of the pre-trial matters have been previously transcribed and were in possession of trial counsel prior to the commencement of the trial in these proceedings. In addition, I believe the penalty phase itself was transcribed and was turned over to counsel within, I think within two weeks and that they've had that in their possession. The trial was over on November the 8th and the jury finished their service at that time completing the penalty phase portion of the trial.
>
> The Court feels that 32 days is ample time in order to prepare the documentation to be submitted, specifically noting that all of the grounds for arrest of judgment, those being on the face of the pleadings themselves, obviously have the opportunity to have been reviewed extensively both prior to trial, during trial, and now post trial. And one was noting that the standard, other than new evidence being obtained with regard to grounds for a new trial is based on whether there should be - - the verdict is contrary to law and evidence or there is some substantial injustice.
>
> The Court standing in the place as a thirteenth-juror reviewing sufficiency of evidence within its mind, the Court noting that it sat through the entirety of the trial in both phases. So the Court feels that it is ready to proceed, that there is sufficient information preserved of record with regard to the Motion for New Trial and Arrest of Judgment.

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[390] Vol. 13, p. 3066.

> And we will proceed at this point, there being no additional time to grant it to the Defense to supplement either Motion for New Trial or Arrest of Judgment. Therefore, we will move forward at this time and address the remaining 29 claims that are contained in the Motion for New Trial.[391]

The record does not support the defendant's contention that the trial court's ruling denying the defense sufficient time to prepare for the motion for new trial violated his right to counsel. Rather, we find no error or abuse of the trial court's discretion in refusing to delay sentencing and in acting on the motion for new trial. Despite the short time period, appellate defense counsel was able to prepare and file a 49-page motion which raised 30 separate claims.[392] The record shows the trial court painstakingly heard argument regarding the merits of each claim in a contradictory hearing that lasted over two hours.[393] The claims raised by the defendant were thoroughly considered by the court.

The defendant points to no specific prejudice with regard to the denial of the motion for new trial on the merits. We note that, of the 30 claims raised, most of the issues presented have additionally been considered on appeal and found to be without merit.[394] Consequently, the defendant fails to show how denial of the motion for new

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[391] Vol. 44, p. 10897-10899.

[392] *See* Vol. 13, p. 3065-3114.

[393] Vol. 44, p. 10976; *see generally* Vol. 44, p. 10887-10980.

[394] The 30 claims raised in the Motion for New Trial are as follows:

(1) Serious Claims About Potential Judicial Bias Require Investigation And May Warrant Recusal Of The District Court;
(2) Mr. Reeves Was Entitled To Counsel Of Choice Willing To Represent Him At No Additional Cost To The State Fisc;
(3) Counsel Had An Actual Conflict Of Interest;
(4) Counsel Instructed Mr. Reeves Not To Testify To Avoid Introduction Of Prior Felony Conviction For Attempted Escape;
(5) The Court Appointed Counsel With Too Much To Do;
(6) The Improper Redaction Of The Statement Violated The State And Federal Constitutions;
(7) No *Jackson v. Denno* Hearing Was Held On The Statements That The State Used At The Center Of The Penalty Phase;
(8) The Inculpatory Statement Was The Fruit Of An Illegal Arrest And A Coercive Interrogation;
(9) Evidence Concerning Future Dangerousness Was Improperly Admitted;
(10) The State Introduced Victim Impact Evidence At The Guilt Phase;
(11) The State Repeatedly Made Comments About Mr. Reeves' Failure To Testify;

(12) One Juror's Vote Against Conviction Prohibits The State From Executing Mr. Reeves;
(13) The Instruction Contained An Improper Articulation Requirement;
(14) Mr. Reeves' Presumption Of Innocence Was Destroyed When The State Made Repeated Comments About His Incarceration And Where His Witnesses Were Forced To Wear Prison Garb;
(15) The Jury Did Not Decide That Death Was The Appropriate Punishment Beyond A Reasonable Doubt;
(16) Comments About The Appellate Process And About The Possibility Of Commutation And Parole Deprived Mr. Reeves Of A Fair Trial;
(17) Comments About The Good Quality Of Life At Angola Or The Good Medical Care At CCC, Introduced Arbitrary Factors Into The Proceeding;
(18) The Trial Court's Refusal To Give Proposed Mitigating Instructions Violated Mr. Reeves' Rights Under The Eighth Amendment To The United States Constitution;
(19) Jurors Who Refused To Consider Mitigating Circumstances Were Not Excused;
(20) Investigation Is Necessary To Assess Evidence Of Potential Sequestration Violations, Dishonesty On Voir Dire, And Other Jury Related Issues;
(21) The Indictment Failed To Include The Necessary Elements Of First Degree Murder And The Aggravating Circumstances Relevant To The Penalty Phase;
(22) The Clerk Of Court Read The Indictment And The Trial Court's Introductory Instructions Enumerated The Three Aggravating Circumstances That "Shall Be Considered," But There Was No Mention Of Mr. Reeves' Presumption Of Innocence Or Of Mitigation At All Or Any Consideration Of A Life Sentence;
(23) The Death Sentence Is The Unreliable Product Of Inadmissible Evidence And Argument Regarding Other Crimes And Bad Acts, In Violation Of Mr. Reese's [sic] Rights To Humane And Proportionate Punishment And Due Process Under U.S. Const. Amends. VII and XIV And Louisiana State Constitutional Counterparts;
(24) The State's Invocation Of Two Juvenile Adjudications As Felony Convictions Requires Reversal Of The Death Sentence;
(25) The Court Improperly Allowed The State To Urge The Jury To Sentence Mr. Reeves To Death Based Upon His Failure To Complete Treatment/Parole;
(26) The Trial Court Refused To Instruct The Jury That Mr. Reeves' Terrible Childhood Was A Mitigating Circumstance That It Was Required To Consider;
(27) Proceedings Occurred Outside The Presence Of Mr. Reeves;
(28) Introduction Of Victim Impact Evidence That Far Exceeded The Scope Of *Payne* And *Bernard* Violated Mr. Reeves' Right To A Fair And Reliable Sentencing;
(29) Reference To Other Crimes Requires Reversal Of Conviction And Death Sentence; and
(30) The Verdict Form Was Patently Unconstitutional.

See Vol. 13, p. 3065-3114. There were seven issues raised in the motion for new trial that are not repeated in the defendant's direct appeal. None of these issues have merit.

In Claim 11, the defendant argued the prosecutor continuously referred to the defendant's failure to testify. Our review of the record finds no such references. In addition, the jury was properly instructed that the argument or statements of counsel were not evidence. In Claim 12, the defendant argued that the jury's vote for conviction of first degree murder was not unanimous. The record clearly shows that the jury was polled on their verdict and the verdict was unanimous. *See* Vol. 42, p. 10463. In Claim 14, the defendant asserts that comments regarding the defendant's pretrial incarceration were prejudicial. We find that these references occurred only during the introduction of the statements made by the defendant, in both the guilt and penalty phases. We find the statements were properly introduced. In Claim 20, the defendant asserts he needed time to investigate sequestration violations and possible dishonesty of the prospective jurors on voir dire. There is no evidence of record to support this claim. In Claim 21, the defendant urges that the bill of indictment was defective. We find no error in the bill of indictment found in the record. *See* Vol. 1, p. 235; La. C.Cr.P. arts. 464, 465. In Claim 22, the defendant alleges the reading of the bill of indictment somehow prejudiced him because there was no mention of the presumption of innocence. We find the jurors were instructed regarding the presumption of innocence throughout voir dire, prior to the reading of the indictment. In addition, the trial judge properly instructed the jurors as

trial on the merits affected his substantial rights. *See* La. C.Cr.P. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.").

Assignment of Error 79
Cumulative Error

The defendant argues that the cumulative effect of the errors raised in both the guilt and penalty phases of the trial requires reversal, even if none of them individually do. This court has previously held that "the combined effect of the incidences complained of, none of which amounts to reversible error [does] not deprive the defendant of his right to a fair trial." *State v. Copeland*, 530 So.2d 526, 544-545 (La. 1988), *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989), *quoting State v. Graham*, 422 So.2d 123, 137 (La. 1982), *appeal dismissed*, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309 (1983). Our review of all of the defendant's assignments of error failed to reveal reversible error.

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to the presumption of innocence. *See* Vol. 42, p. 10434. In Claim 27, the defendant contends that proceedings occurred outside the presence of the defendant, in violation of his rights. We note that, throughout the proceedings, the court and counsel were meticulous in noting for the record whether the defendant was present or absent, and if absent, that defense counsel waived the defendant's presence. We find no error in this regard. In Claim 30, the defendant argues the jury used an improper verdict form in penalty phase which improperly placed the burden of proof regarding mitigation on the defendant. We find no error in the penalty phase verdict form used in this matter. *See* Vol. 13, p. 3055.